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Second report on State responsibility

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I. Scope of the present Report[1]

1. The present report continues the task, begun in 1998,[2] of systematically considering the draft articles in the light of the comments of Governments and developments in State practice, judicial decisions and in the literature. In later parts of the report it is also proposed to deal with certain general issues raised by Parts Two and Three of the draft articles, and to begin considering the articles in Part Two.[3]

II. Review of draft articles in Part One

A. Part One, Chapter III: Breach of an International Obligation

1. Introduction

(a) Overview

2. Chapter III of Part One consists of 11 articles dealing with the general subject of "breach of an international obligation". The matters dealt with in Chapter III on analysis fall into five groups:[4]

(a) Articles 16, 17 and 19 (1)[5] deal with the notion of breach itself, emphasising the irrelevance of the source of the obligation or its subject matter;

(b) Article 18 (1) and (2) deals with the requirement that the obligation be in force for the State at the time of its breach;

(c) Articles 20 and 21 elaborate upon the distinction between obligations of conduct and obligations of result, and in similar vein article 23 deals with obligations of prevention;

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[2] See First Report, A/CN.4/490/Add.4–6.

[3] Since the First Report, further Government comments have been received: see A/CN.4/488/Add.3 and A/CN.4/492. So far as these relate to articles 16 ff., they are taken into account in what follows. It is proposed to reserve discussion of further comments on draft articles 1 to 15 until all the draft articles have been dealt with, at which point they will have to be looked at again in their ensemble.

[4] For the *travaux* on Chapter III see: Ago, Fifth (1976), Sixth (1977) and Seventh (1978) reports; *Yearbook ... 1978*, vol. I, pp. 232–237 (plenary debate); ibid., pp. 269–270 (report of Drafting Committee); ILC report on the work of its thirtieth session (1978), pp. 184–186 (summary of the *travaux*); *Yearbook ... 1976*, vol. II (Part Two), pp. 78–122, *Yearbook ... 1977*, vol. II (Part Two), pp. 11–50, *Yearbook ... 1978*, vol. II (Part Two), pp. 81–98 (text of the draft articles and commentaries thereto).

[5] Article 19 (2)–(4) deals with the definition of international crimes of States. The issues it raises are addressed in the context of the discussion on the distinction between "criminal" and "delictual" responsibility (see, for the First Report, A/CN.4/490/ Add.1, Add.2 and Add.3).

(d) Articles 24 to 26 deal with the moment and duration of breach, and in particular with the distinction between continuing wrongful acts and those not extending in time. They also develop a further distinction between composite and complex wrongful acts. Article 18, paragraphs (3) to (5), seek to specify when continuing, composite and complex wrongful acts have occurred, and deal with issues of intertemporal law in relation to such acts;

(e) Article 22 deals with an aspect of the exhaustion of local remedies rule, which is analysed within the specific framework of obligations of result.

For reasons that will emerge, it is proposed to deal with the articles in this order.

3. Taken together, the articles in Chapter III seek to analyse further the requirement, already laid down in principle by article 3 (b), that in every case of State responsibility there must be a breach of an international obligation *of* a State *by* that State. But there is a difficulty in taking this analysis much further without transgressing the distinction between primary and secondary rules, on which the draft articles as a whole are founded. In determining whether there has been a breach of an obligation, consideration must be given above all to the substantive obligation itself, its precise formulation and meaning, all of which fall clearly within the scope of the primary rules. However the principles and distinctions elaborated in Chapter III are intended to provide a framework for that consideration, and to the extent that they do so, Chapter III can have a useful function.[6]

(b) Comments of Governments on Chapter III as a whole

4. No comments call into question the need for Chapter III as a whole. But the United Kingdom of Great Britain and Northern Ireland expresses concern that "the fineness of the distinctions drawn [in Chapter III] between different categories of breach may exceed that which is necessary, or even helpful, in a statement of the fundamental principles of State responsibility".[7] Germany, summarizing its comments on individual articles, notes that (in addition to article 19) Chapter III contains "a number of provisions that should be revised or redrafted".[8] Japan complains that the categorization of international obligations in Chapter III contains "excessively abstract concepts ... laid down in unclear language"; in its view the difficulty of drawing these distinctions "would be counter-productive to any effort to settle a dispute".[9]

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[6] There is almost no systematic treatment in the literature of the subject of breach of international obligations as such. Breach of treaty has been studied to some extent: see in particular Sir Gerald Fitzmaurice's Fourth Report on the Law of Treaties, *Yearbook ... 1959*, vol. II, pp. 37–81, which dealt with "The Effects of Treaties". That report was never debated by the Commission, and although certain aspects of it were subsumed by his successor, Sir Humphrey Waldock, and are now included in the Vienna Convention on the Law of Treaties; those relating to non-performance of obligations arising from treaties were left to be dealt with in the framework of State responsibility. On breach of treaties see also S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985); P. Reuter, *Introduction au droit des traités* (PUF, Paris, 3rd edn., ed. Cahier, 1995) chap. 4 (who nevertheless conflates breach and invalidity under the rather unhelpful title of "*non-application des traités*").

[7] A/CN.4/488, p. 46.

[8] Ibid.

[9] A/CN.4/492. See also the comments made by some Governments (Austria, Byelorussian SSR, Canada, Chile, Mali, the Netherlands, Ukrainian SSR, Union of Soviet Socialist Republics and Yugoslavia in *Yearbook ... 1980*, vol. II, Part One, pp. 87–106; Bulgaria, Czechoslovakia, Federal Republic of Germany, Mongolia and Sweden in *Yearbook ... 1981*, vol. II, Part One, pp. 71–78) when Chapter III was first adopted.

2. Review of specific articles in Chapter III

(a) Article 16: Existence of a breach of an international obligation

5. Article 16 provides as follows:

> "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation."

6. Article 16 repeats within the framework of Chapter III, but in slightly different language, the element already expressed in article 3 (b). Under article 3 (b), an internationally wrongful act occurs when conduct attributable to a State "constitutes a breach of an international obligation of [that] State". But article 16 specifies the element of breach a little further, identifying as a breach (and thus as wrongful) all conduct which "is not in conformity with what is required of" the State by the obligation in question. This element is sometimes described as the "objective" element of State responsibility, as compared with the requirement of attribution which is described as the "subjective" element. The notion of State responsibility as focusing on the right (*le droit subjectif*) of the injured State is discussed further in the context of article 40 and its definition of "injured State". But there are other difficulties in the dichotomy between "subjective" and "objective". After all, attribution is a legal process, and is in that sense "objective".[10] In addition, the existence of a breach of international law may depend on the knowledge or state of mind of the actor(s) for whose conduct the State is responsible. In such cases some mental element is attributed to the State as a basis for its responsibility,[11] which is thus, in one sense at least, "subjective", although still in principle governed by international law. Moreover, the same act may be a breach of a treaty vis-à-vis one State but lawful, or even required, under a treaty with another State:[12] in such cases the notion of "breach" has an inter-subjective element which is missing in relation to attribution. For these reasons, the terminology of "subjective" and "objective" elements of responsibility is confusing and is best avoided.

7. The commentary to article 16 justifies the use of the term "not in conformity with", noting that "it expresses more accurately the idea that a breach may exist even if the act of the State is only partially in contradiction with an international obligation incumbent upon it".[13] It goes on to distinguish breach of an international obligation from a breach of comity,[14] or of a contract between a State and a private person or corporation,[15] or generally of "legal obligations governed by a legal order other than the international legal order".[16] It notes the need for compliance with other articles of Chapter III in order to establish a breach, but says nothing about the relationship between Chapters III and V.

8. There have been only a few Government comments on article 16. France raises the question of breach of an international obligation which is overridden by "an obligation considered to be superior", citing as an example Article 103 of the Charter of the United

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[10] The commentary to article 16, para. (2), stresses "the autonomy of international law" in relation to breach, but international law also determines the question of attribution: see First Report, A/CN.4/490/Add.5, para. 158. It is true that in doing so it takes into account the provisions of internal law as to the status of persons acting on behalf of the State: ibid., para. 167. But provisions of internal law are relevant in determining whether there has been a breach of an obligation. In both respects the dominant principle is that stated in article 4: see First Report, A/CN.4/490/Add. 4, paras. 140–143.

[11] As in the *Corfu Channel Case*, see *I.C.J. Reports 1949*, p. 4, at p. 22.

[12] See para. 9 (c) and (d) below.

[13] Commentary to article 16, para. (4).

[14] Ibid., para. (5).

[15] Ibid., paras. (6)–(7).

[16] Ibid., para. (7).

Nations. It therefore proposes the addition of the words "under international law" at the end of article 16.[17] The United Kingdom suggests that article 21 (obligations of result) be merged with article 16.[18]

Article 16 and the problem of conflicting international obligations

9. France's comment raises the general question of conflicting international obligations. So far as Article 103 of the Charter is concerned, the question might be thought sufficiently regulated by article 39 of the draft articles, on the assumption that that article will be expressed to apply to the draft articles as a whole.[19] But the problem of potentially conflicting international obligations is a wider one.

(a) The first situation to be considered is where general international law resolves a contradiction between two or more international obligations which are, or have been, in force for a State, so that under international law, one of those obligations prevails over the other. For example, under the law of treaties, a later treaty between the same parties prevails over an earlier one to the extent of any inconsistency.[20] A later inconsistent rule of general international law normally prevails over an earlier rule. A peremptory norm of international law prevails over any inconsistent norm not having that character (i.e. any norm of *jus dispositivum*).[21]

(b) A second situation occurs where one treaty provision claims priority over another, as for example Article 103 of the Charter. All Members of the United Nations have thereby agreed that in their mutual relations, Charter obligations prevail over other treaty obligations, even under later treaties. This was the basis for the Court's decision in the *Lockerbie* cases, to the effect that the Libyan Arab Jamahiriya rights under the Montreal Convention of 1971 not to extradite certain nationals were subordinated to its duty to do so under a Security Council resolution with which Libya was, *prima facie*, obliged to comply under article 25 of the Charter.[22]

(c) These cases, however interesting they may be for other purposes, raise no special difficulties for article 16. In each case, one international obligation prevails, and no State has any right that the "subordinate", "suppressed" or "repealed" provision should be complied with. But the rules referred to above cannot ensure complete consistency between the international obligations of a State, any more than national law can ensure completely against valid but inconsistent contractual obligations. Thus under article 30 (4) of the Vienna Convention on the Law of Treaties, if any of the parties to two inconsistent treaties is different, both treaties are considered to remain in force, with the consequence that State A (a party to both) may have one set of obligations to one group of States and another set of obligations to another.[23] In *Costa Rica v. Nicaragua*,[24] the Central American Court of Justice held that Nicaragua was internationally responsible to Costa Rica for entering into a treaty with a third State[25] without first complying with the consultation requirements of an earlier treaty between Nicaragua and Costa Rica. The Court did not, however, declare the later treaty invalid, because it had no jurisdiction over the United States. In the *Case concerning East Timor*, the International Court was even more reticent. It was argued that Australia's entry into a treaty with Indonesia which conflicted with the rights of Portugal under the Charter, as well as with the rights of the people of East Timor as represented by Portugal, gave rise to the international responsibility of Australia. Unlike Costa Rica, Portugal expressly did not seek a determination that the treaty with Indonesia was void, restricting itself to a claim of responsibility. The Court declined to decide the case at all, on the ground that it could not do so without first pronouncing on the illegality of the conduct of Indonesia, a State not a party to the proceeding.[26] In these circumstances, it was not competent to determine Portugal's claim of responsibility against Australia.

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[17] A/CN.4/488, p. 46.

[18] Ibid., p. 47. See also the comments by Chile (*Yearbook ... 1980*, vol. II, Part One, p. 95), Yugoslavia (ibid., p. 106) and the Federal Republic of Germany (*Yearbook ... 1981*, vol. II, Part One, p. 74).

[19] This was foreshadowed in First Report, A/CN.4/490/Add.3, paras. 79–80.

[20] Vienna Convention on the Law of Treaties, article 30 (3), subject to article 41.

[21] Other contingencies include the supersession of an earlier customary rule (not a rule of *jus cogens*) by a later treaty, and the desuetude of a treaty as a result of a new rule of general international law. On these and similar problems see, e.g. S. Rosenne, *Breach of Treaty* (Cambridge, Grotius Publications, 1985), pp. 85–95; G. Binder, *Treaty Conflict and Political Contradiction* (New York, Praeger, 1988); C. Chinkin, *Third Parties in International Law* (Oxford, Clarendon Press, 1993), pp. 69–80; N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Oxford, Clarendon Press, 1994); P. Reuter, *Introduction au droit des traités* (PUF, Paris, 3rd edn., ed. Cahier, 1995) pp. 116–131.

[22] See *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Request for the Indication of Provisional Measures, I.C.J. Reports 1992*, p. 3; ibid. *(Libyan Arab Jamahiriya v. United States of America) I.C.J. Reports 1992*, p. 114. For the purposes of the Applications, the validity of the Security Council resolution was presumed. Different questions arise in respect of compliance with the Charter of decisions taken under it by non-members: see Charter Article 2 (6); W.G. Vitzthum, "Article 2 (6)", in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (Oxford, Oxford University Press, 1994) pp. 131–139.

(d) The Vienna Convention on the Law of Treaties does not contemplate that a treaty will be void for inconsistency with another treaty.[27] Instead, it seeks to resolve the difficulties of conflicting treaty obligations by expressly reserving "any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty".[28] Thus it is no excuse under international law for non-compliance with a subsisting treaty obligation to State A that the State was simultaneously complying with a treaty obligation to State B. So far as the law of responsibility is concerned, this raises questions about the possibility of cessation or restitution in cases where it is impossible for the State concerned to comply with both obligations. This may raise issues for Part Two of the draft articles, but not for the formulation of article 16.

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[23] See the commentary to that provision (article 26 in the ILC final draft), para. (11), *Yearbook ... 1966*, vol. II, p. 217 and also Waldock, Sixth Report, *Yearbook ... 1966*, vol. II, p. 76.

[24] (1917) 11 *AJIL* 181.

[25] Viz., the Interoceanic Canal (Bryan-Chamorro) Treaty of 5 August 1914 between Nicaragua and the United States of America; text in *Treaties and Other International Agreements of the United States of America, 1776–1949*, vol. 10, p. 379.

[26] *I.C.J. Reports 1995*, p. 90, applying the principle of admissibility enunciated in *Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954*, p. 32. Formally the decision may be distinguishable from *Costa Rica v. Nicaragua*. In that case there was no question raised of any unlawful act on the part of the United States, even though it clearly had notice of the provisions of the earlier treaty. But it is slightly odd that a treaty should be considered void for a breach, by one party only, of other treaty with a third State, whereas a treaty arguably entered into in disregard of an *erga omnes* norm should escape judicial scrutiny. For discussions of the *East Timor* case see, e.g., C. Chinkin, "The East Timor Case (*Portugal v. Australia*)", *ICLQ*, vol. 45, 1996, p. 712; E. Jouannet, "Le principe de l'*Or monétaire*, à propos de l'arrêt de la Cour du 30 juin 1995 dans *l'Affaire du Timor oriental (Portugal c. Australie)*, *RGDIP*, vol. 100, 1996, p. 673; J. M. Thouvenin, "L'arrêt de la C.I.J. du 30 juin 1995 rendu dans *l'Affaire du Timor oriental (Portugal c. Australie)*", *AFDI*, vol. XLI, 1995, p. 328.

[27] See article 30 (4), (5). Articles 52, 53, 64, 69 and 71 expressly deal with cases where a treaty is void, and they were intended to be exclusive. See P. Reuter, *Introduction au droit des traités, PUF, Paris* (3rd edn., ed. Cahier, 1995), p. 153 (para. 251). H. Lauterpacht argued strenuously for the invalidity of later conflicting treaties, relying largely on municipal law analogies: see "The Covenant as the 'Higher Law'" (1936) in 4 *International Law. Collected Papers* (ed., E. Lauterpacht, Cambridge, 1978) p. 326, and especially "Contracts to Break a Contract" (1936), ibid., p. 340, at pp. 371–375.

[28] Ibid., article 30 (5). Article 30 itself is stated to be "[s]ubject to Article 103 of the Charter of the United Nations": see article 30 (1).

The relationship between disconformity with an obligation, wrongfulness and responsibility

10. Article 16 identifies as a breach of an obligation any failure to "conform" with what is required of a State by that obligation. One difficulty with this idea is the identification of the "obligation" in question. It is normally said, for example, that States are under an obligation to protect diplomatic premises, or to allow innocent passage to foreign vessels in the territorial sea, the obligation being identified with the particular primary rule as found, respectively, in article 22 (2) of the Vienna Convention on Diplomatic Relations, or in article 17ff of the United Nations Convention on the Law of the Sea, or their customary law equivalents. But these primary rules do not specify all of the conditions which have to be met in order for a breach of an obligation to be established. Within the system of the draft articles, and under general international law, certain other factors are relevant to the question whether there has been a breach, for example, the consent of the "victim" State, or the circumstances of self-defence or *force majeure*. It might be said that, properly understood, the primary rule actually contains in itself all the conditions, qualifications, justifications or excuses applicable to it, so that the notion of "conformity" with the obligation imposed by that rule entails that all these conditions or qualifications are met, and all possible justifications or excuses excluded. But it is clear that this is not the sense in which article 16 should be read. Otherwise it would be circular, saying nothing more than that the breach of an obligation occurs when that obligation is breached. Moreover, the circumstances precluding wrongfulness, dealt with in Chapter Five, are treated as secondary rules of a general character, and not as a presumptive part of every primary rule.

11. If this is so, then there is a difficulty with article 16, in that it appears to say that a breach of an international obligation occurs when an act attributable to a State does not conform with the obligation imposed on that State by a primary rule, notwithstanding that one of the circumstances precluding wrongfulness in Chapter Five may exist. This might appear to create a kind of "wrongfulness in the abstract", i.e. a breach for which no State is responsible, which the Commission in its commentary expressly disclaims.[29] Or it might appear to contradict article 3, which provides that attribution and breach are, taken together, sufficient conditions for wrongfulness.[30] How can there be wrongfulness in circumstances where wrongfulness is precluded?

12. In responsibility cases since article 16 was adopted, the International Court has approached this issue in rather different ways.

(a) In the *Diplomatic and Consular Staff* case, the Court, having determined that the conduct in question was attributable to the Islamic Republic of Iran, concluded that on the facts the Islamic Republic had failed to comply with its obligations under the relevant treaties and under general international law to protect the diplomatic and consular personnel and to respect and secure their inviolability. It concluded that there had been "successive and still continuing breaches by Iran of its obligations to the United States", and added:

> "Before drawing from this finding the conclusions which flow from it, in terms of the international responsibility of the Iranian State vis-à-vis the United States of America, the Court considers that it should examine one further point. The Court cannot

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[29] See First Report, A/CN.4/490/Add.4, para. 125, and the discussion; ibid., paras. 126-129.

[30] See commentary to article 3, paras. (11) and (12), as adopted on first reading.

> overlook the fact that on the Iranian side ... the idea has been put forward that the conduct of the Iranian Government ... might be justified by the existence of special circumstances."[31]

The Court went on to examine, and reject, a possible "defence" of Iran, not specifically pleaded (because Iran had not appeared), still less proved. The Court noted that even if it had been duly pleaded and proved, it would not have constituted "a justification of Iran's conduct and thus a defence to the United States claims in the present case".[32] It was on this basis that the Court sustained the finding that Iran "has incurred responsibility towards the United States".[33] Apparently the breach of the obligation occurred, as it were, prior to any determination as to the existence of any special justification or "defence", whereas the determination of responsibility was only made *after* such a defence had been excluded. This may imply that responsibility has not two but three elements, attribution, breach and the absence of any "special" defence or justification — although too much should not be read into a judgment dealing with an egregious breach, in a case where the Respondent State did not appear and where the Court was apparently leaving no stone unturned in its analysis.

(b) In the *Case concerning the Gabcikovo-Nagymaros Project*, the Court noted that:

> "when a State has committed an internationally wrongful act, its international responsibility is *likely to be involved* whatever the nature of the obligation it has failed to respect".[34]

Further, the Court stressed that:

> "when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that, in 1989, it had acted *in accordance with* its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner."[35]

But how can it be said that international responsibility is "likely" to be involved in the event of an internationally wrongful act if, according to article 3, there can be no such act without responsibility?

13. The Tribunal in the *Rainbow Warrior* arbitration adopted yet another formula, referring to "the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent)".[36] But in accordance with article 16, "there is a breach of an international obligation ... when an act of that State is not in conformity with what is required of it"; the breach is not merely "apparent".

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[31] *I.C.J. Reports 1980*, p. 3, at p. 38.

[32] Ibid., p. 39; see also at p. 41.

[33] Ibid., p. 41.

[34] *I.C.J. Reports 1997*, p. 3., at p. 38 (para. 47) (emphasis added), citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, I.C.J. Reports 1950*, p. 228, and article 17 of the draft articles.

[35] *I.C.J. Reports 1997*, p. 3 at p. 39 (para. 48) (emphasis added).

[36] (1990) 20 UNRIAA 217, at p. 251.

14. The difficulty may be more semantic than real, but nonetheless there is a difficulty. On the one hand, it cannot be said that a State which has evidently not acted in the manner required by a treaty or customary obligation in force for it has nonetheless acted "in conformity with" or "in accordance with" that obligation. On the other hand, it is odd to say that a State has committed an internationally wrongful act when the circumstances are such as to preclude the wrongfulness of its act under international law. However, this problem is more appropriately discussed in the framework of Chapter Five (circumstances precluding wrongfulness). For the moment, a reservation needs to be entered to the language of article 16, depending on the analysis to be undertaken of the various concepts underlying Chapter Five. But France's suggestion that the words "under international law" be added to article 16 seems a sensible one in any event, since it emphasizes the point that the existence and content of an international obligation are determined by the system of international law and not just by the literal terms of any particular text taken in isolation.

"not in conformity with what is required of it by that obligation"

15. Finally, it might be asked whether the words "not in conformity with what is required ... by that obligation" are apt to cover the many different kinds of breach. In some cases, an international obligation may require precisely defined conduct from the State concerned (e.g. the enactment of a specified law). In others it may set a minimum standard of conduct above which the State concerned is free to go (e.g. most human rights obligations). Later articles attempt to encapsulate some of these differences by drawing distinctions between so-called obligations of conduct, obligations of prevention and obligations of result; these are discussed in due course. It can be argued that the phrase "is not in conformity with" is flexible enough to cover the many permutations of obligation, and that any doubts can be sufficiently covered in the commentary. On the other hand, it is slightly odd to talk of an act as not being "in conformity with" an obligation. The Drafting Committee may wish to consider alternative formulations in the various languages (e.g. "does not comply with").

(b) Article 17: Irrelevance of the origin of the international obligation breached

16. Before reaching any conclusion on article 16, it is necessary to consider also articles 17 and 19 (1). Article 17 provides as follows:

> "1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.
>
> "2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State."

17. The commentary to article 17 poses the important question whether international law has a single regime of responsibility for all breaches of obligation, i.e. whether it matters that the "origin" of an obligation is a bilateral or multilateral treaty, a unilateral act, a rule of general international law, a local custom or a general principle of law. It notes that:

> "most systems of internal law distinguish between two different regimes of civil liability, one of which applies to the breach of an obligation assumed by contract, the other to the breach of an obligation having its origin in another source."[37]

The answer given, drawing on the implication already provided in articles 1 and 3, is: no. Unlike most systems of national law,[38] international law has a single regime of responsibility, or at least a single general regime. It is possible for special self-contained regimes of responsibility to be developed, in which case the general regime of responsibility will be excluded either by express provision or (more likely) by application of the *lex specialis* principle, dealt with in article 37 of the draft articles.[39] But apart from that, there is, it is argued, no systematic distinction in international law between obligations arising from treaties and those arising in other ways (e.g. by unilateral act, under general international law).[40] While the absence of explicit authority on the point is noted, a review of case law and practice reveals that:

> "The customary, conventional or other origin of the obligation breached is not invoked to justify the choice of one form of reparation in preference to another, for instance, or to determine what subject of law is authorized to invoke responsibility."[41]

Various reasons are given for the absence of any such distinction. In particular, "the same obligation is sometimes covered by a customary rule and by a rule codified conventionally",[42] and the same treaty often contains "contractual" and "law-making" provisions, so that the suggested distinction between *traités-lois* and *traités-contrats* is unreliable.[43]

18. A second question, addressed by article 17 (2), is whether the origin of an international obligation may in some way affect the regime of responsibility for its breach. Here, a potentially relevant distinction is that between obligations owed to the international community of States as a whole and those owed to one or a few States. But nonetheless, the commentary asserts that "the pre-eminence of these obligations over others is determined by their content, not by the process by which they were created".[44] The reason given is that "there is, in the international legal order, no special source of law for creating

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[37] Commentary to article 17, para. (3). The statement is something of an oversimplification, since some legal systems go beyond the basic distinction between liability *ex contracto* and liability *ex delicto*. For example, for historical reasons — limitations on contractual liability imposed by rules relating to consideration and privity, the lack of any general principle of tortious liability, the limitations imposed by the forms of action — the common law developed further categories of liability that were neither contractual or tortious (quasi-contract, restitution ...). See J. Cooke and D. Oughton, *The Common Law of Obligations* (Butterworths, London, 2nd ed., 1993), pp. 5–6, 52–59; W.V.H. Rogers, *Tort (Winfield and Jolowicz)* (Sweet and Maxwell, London, 15th ed., 1998) pp. 4–18. For an attempt to analyse State responsibility in terms of the "causes of action" see I. Brownlie, *System of the Law of Nations, State Responsibility Part I*, OUP, Oxford, 1983, pp. 53–88.

[38] For a brief comparative review, see A. Tunc, *La responsabilité civile* (2nd edn., Economica, 1989), pp. 32–46, who admits the validity of the distinction in principle but calls for a unification of the regimes of contractual and delictual responsibility as far as possible, noting that this was first achieved by the Civil Code of Czechoslovakia in 1950.

[39] See commentary to article 17, para. (5), and for the treatment of the *lex specialis* principle in the draft articles, see First Report, A/CN.4/490/Add.4, para. 27.

[40] See commentary to article 17, paras. (19)–(20).

[41] Ibid., para. (11).

[42] Ibid., para. (20).

[43] Ibid.

[44] Commentary to article 17, para. (21).

'constitutional' or 'fundamental' principles ..."[45] It concludes that there is no need for article 17 to refer to Article 103 of the Charter, or to peremptory rules of international law.[46]

Government comments on article 17

19. Switzerland notes that the clarification in article 17 "although absolutely correct, adds nothing new to the principle articulated in article 16".[47] Greece remarks that paragraph 2 "would appear to be superfluous".[48]

Article 17 (1): the "origin" of obligations (customary, conventional or other)

20. In the *Rainbow Warrior Arbitration*, New Zealand argued that issues of the performance of a treaty were primarily governed by the law of treaties, and that the law of State responsibility had a merely supplementary role.[49] One corollary, according to New Zealand, was that the only excuses for failure to comply with a treaty obligation were those contained in the Vienna Convention on the Law of Treaties (e.g. impossibility of performance, fundamental change of circumstances). The Tribunal disagreed. In its view:

> "the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness ... and the appropriate remedies for breach, are subjects that belong to the customary law of State responsibility. The reason is that the general principles of international law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and, consequently, to the duty of reparation. The particular treaty itself might of course limit or extend the general law of State responsibility, for instance by establishing a system of remedies for it."[50]

21. In the *Case concerning the Gabcikovo-Nagymaros Project*, the International Court referred to article 17 in support of the proposition that it is "well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect".[51] This passage has already been discussed, but it does lend further support to the proposition contained in article 17 (1).[52]

Article 17 (2): "does not affect"

22. According to the commentary, the language of article 17 (2) seeks only to convey that "there is no *raison d'être* in general international law for a distinction between different

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[45] Ibid.

[46] Commentary to article 17, para. (23).

[47] A/CN.4/488, p.47.

[48] A/CN.4/492, p. 8.

[49] (1990) 20 UNRIAA 217 at p. 249.

[50] Ibid., at p. 251. The Tribunal was unanimous on this point.

[51] *I.C.J. Reports 1997*, p. 7, at pp. 38–39 (para. 47).

[52] In that case, Slovakia had reserved the right to argue (as New Zealand had done) that circumstances precluding wrongfulness were no excuse for a breach of an express treaty provision. Hungary disagreed. As the Tribunal had done in *Rainbow Warrior*, the International Court treated the circumstances precluding wrongfulness as relevant in principle to the question of breach of a treaty, but it went on to hold that the relevant circumstances did not justify non-compliance in fact: *I.C.J. Reports 1997*, p. 7, at pp. 38 (para. 47) and 63 (para. 101).

types of internationally wrongful act according to the origin of the obligation".[53] In particular, it is said, the hierarchical superiority of one obligation over another (e.g. under Article 103 of the Charter, as between Member States) does not have any consequences for the regime of responsibility:

> "the consequences of applying the principle stated in [Article 103] do not relate to international responsibility arising from a breach of international obligations, but rather to the validity of certain treaty obligations in the event of a conflict between them and the obligations contracted by Members of the United Nations by virtue of the Charter. As a result of the provision in Article 103, an obligation under an agreement in force between two States Members of the United Nations which is in conflict with an obligation under the Charter becomes ineffective to the extent of the conflict: consequently, it cannot be the subject of a breach entailing international responsibility. And if an obligation in conflict with those laid down by the Charter binds a Member State to a non-member State, the problem created will be that which normally arises in the event of conflict between obligations contracted by one State with several other States: that is to say, unless the rule in the Charter establishing a certain obligation has meanwhile become a peremptory rule of general international law binding, as such, on all States. Thus there is no special problem of responsibility to be solved."[54]

23. This passage calls for several comments. The first is that in Part Two of the draft articles, a number of distinctions are drawn between breaches of obligations of a special character (obligations *erga omnes*, peremptory norms), as compared, for example, with ordinary breaches of a bilateral treaty,[55] and it may well be that further such consequences should be elaborated. If there is to be a distinction between international crimes and international delicts, one would expect that distinction to have far-reaching effects.[56] For example, in the case of a rule whose main aim is the punishment of the guilty (i.e. in the context of criminal responsibility properly so-called), one would expect different and stricter rules of attribution than in the case of rules of delictual or civil responsibility whose main aim is cessation, restitution and reparation. Faced with these possibilities, it is odd to say that "there is no special problem of responsibility to be solved".

24. Secondly, it is not the case that Article 103 relates "to the validity of certain treaty obligations in the event of a conflict between them and the obligations contracted by Members of the United Nations by virtue of the Charter". Article 103 is expressly concerned to establish a priority as between two conflicting *obligations* in a given case. It provides only that Charter obligations prevail in the event of a conflict with obligations under other treaties, not that the other treaties are invalid.[57] Moreover, the possibility of a conflict between a peremptory norm and an obligation arising under a treaty can be envisaged, even if the treaty is in itself a perfectly proper one.[58] Thus it cannot be excluded that the "origin" of an obligation (for example, in the Charter, or in a peremptory norm) may "affect" international responsibility arising from the internationally wrongful act of a State. Certainly

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[53] Commentary to article 17, para. (27).

[54] Ibid., para. (23).

[55] See articles 40 (3), 43 (b), 50 (e), 51–53.

[56] First Report, A/CN.4/490/Add.1, para. 51; Add.3, paras. 84–86, 90–92.

[57] Article 103 says nothing about conflicts with obligations arising from other sources, e.g. general international law, although as a treaty the Charter would normally prevail as between its parties over any norm other than a norm of *jus cogens*.

[58] E.g. the 1971 Montreal Convention, to which the Court applied Article 103 of the Charter in the *Lockerbie Case (Provisional Measures) I.C.J. Reports 1992*, p. 3 at p. 16. See para. 9 above.

the *content* of an obligation may have a strong bearing on responsibility, and yet the "origin" of an obligation may have important implications for its content.[59]

Conclusions on article 17

25. It may be that all paragraph (2) seeks to convey is that, where an internationally wrongful act has occurred, the origin of the obligation does not alter that fact. But that is a truism; a breach is a breach, whatever the source of the obligation. Moreover, that proposition is already clearly implied in article 3 and in paragraph (1) of article 17. For these reasons, paragraph (2) is unnecessary and confusing and should be deleted.

26. As to paragraph (1), the fact that it has been necessary for the International Court and other tribunals to rule on the matter suggests that the clarification it offers is useful. Moreover, the proposition that international law does not generally distinguish between the regime of responsibility for breaches of treaty and for breaches of other legal rules is an important one. As already noted, many legal systems take the distinction between contractual and delictual responsibility for granted.[60] For these reasons the substance of paragraph (1) should be retained. However, the Special Rapporteur agrees with the comment of the Swiss Government at least to the extent that the substance of paragraph (1) is really a clarification to article 16. It is recommended that article 16 should have added to it the phrase "regardless of the source (whether customary, conventional or other) of that obligation".[61]

(c) Article 19 (1): Irrelevance of the subject matter of the obligation breached

27. Article 19 deals primarily with the "distinction" between international delicts and international crimes of State, which was discussed in detail in an earlier report.[62] However, one aspect of article 19 requires discussion here. Paragraph (1) provides that:

> "1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached."

This is a further clarification of the general language of articles 3 and 16, not unlike that offered in article 17 (1).

28. The commentary to article 19 (1) notes that it "cannot give rise to any doubt even on a purely logical basis",[63] and goes on to review the case law and doctrine. As is common with such elemental notions, there is very little discussion of the precise point in the sources mentioned, no doubt because it was taken for granted or was not in dispute.

Government comments on article 19 (1)

29. There has been more comment by Governments on article 19 than on any other of the draft articles. None of it, however, touches on (or for that matter, calls into question) the

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[59] For example, an obligation arising from a unilateral act should be interpreted primarily in accordance with the intention of the individual actor, but this is not true of a treaty obligation: *cf. Anglo-Iranian Oil Company Case (Preliminary Objection), I.C.J. Reports, 1952*, p. 93, at pp. 104–105.

[60] See para. 17 above.

[61] For the full text of article 16 as proposed, see para. 34 below.

[62] See First Report, A/CN.4/490/Add.1–3; 1998 I.L.C. report, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), paras. 241–331.

[63] Commentary to article 19, para. (3).

principle stated in paragraph (1), except that, for those Governments proposing the deletion of article 19,[64] one may assume that paragraph (1) contains little of value.[65]

The basic principle

30. Curiously, the commentary does not cite the important statement of the Permanent Court in *The Wimbledon*, where the Court affirmed that "the right of entering into international engagements [sc., on any subject whatever concerning that State] is an attribute of State sovereignty".[66] That proposition — viz., that there is no *a priori* limit to the subject matters on which States may assume international obligations — has often been affirmed, in one context or another.[67] For example, in the *Nicaragua Case (Merits)*, the International Court said that it could not "discover, within the range of subjects open to international agreement, any obstacle ... to hinder a State from making a commitment" on "a question of domestic policy, such as that relating to the holding of free elections on its territory".[68]

31. In other words, it has been argued from time to time that a State *could* not, *a priori*, have entered into an obligation on a particular subject matter, and the consistent reply has been that the only question was whether the State *had* done so. Similarly, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same character or description. In the *Case concerning Oil Platforms*, the United States argued that a Treaty of Amity, taking the form of a traditional FCN treaty, could not in principle have been breached by conduct involving the use of armed force and taken in the framework of national security or defence; a "commercial treaty", so it was said, had to be breached "commercially", i.e. by conduct of a commercial rather than a military character. The consequence of the argument was that the Court lacked jurisdiction to entertain a case which did not involve commercial conduct. The Court dealt with the matter shortly:

> "The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not per se excluded from the reach of the Treaty of 1955. The arguments put forward on this point by the United States must therefore be rejected."[69]

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[64] As, e.g., Austria (A/CN.4/488, p. 51); France (ibid., p. 54), United Kingdom (ibid., p. 64), Japan (A/CN.4/492, p. 8).

[65] In earlier comments, Chile pointed out that provisions included in Chapter One and articles 16 and 19 should be read together (*Yearbook ... 1980*, vol. II, Part One, p. 95). The Federal Republic of Germany proposed the incorporation "in article 17 [of] the concept embodied in article 19, paragraph 1" (*Yearbook ... 1981*, vol. II, Part One, p. 74).

[66] *P.C.I.J. Ser. A, No. 1* (1923), at p. 25.

[67] In *Tunis and Morocco Nationality Decrees*, the Court noted that, while the domestic jurisdiction of States extends to matters which are not "in principle" regulated by international law, the extent of domestic jurisdiction was "a purely relative question": *P.C.I.J. Ser. B, No. 4* (1923), at p. 24. See also *Interpretation of Peace Treaties (First Phase), I.C.J. Reports 1950*, p. 65, at pp. 70–71; *Nottebohm Case (Second Phase), I.C.J. Reports 1955*, p. 4 at pp. 20–21; *Interhandel Case (Preliminary Objections), I.C.J. Reports 1959*, p. 6 at p. 24; *Case concerning Right of Passage over Indian Territory (Merits), I.C.J. Reports 1960*, p. 6, at p. 33.

[68] *I.C.J. Reports 1986*, p. 14, at p. 131.

[69] *I.C.J. Reports 1996*, p. 803, at p. 811 (para. 21).

The formulation of the principle: "regardless of the subject matter"

32. Thus the underlying principle is clear, whether it is raised at the level of jurisdiction (as in *Oil Platforms*) or of substance (as in the *Nicaragua* case). However, the reference to "subject matter" in paragraph (1) is both non-specific and raises a perhaps unnecessary question: what subject matters would there be that would make such a difference? After all, some subject matters may lend themselves more readily than others to the conclusion that an international obligation has been assumed. For these reasons, if paragraph (1) is to be retained it may be preferable to formulate it by reference to the "content" rather than the "subject matter" of the obligation.

33. As to whether it should be retained, the fact of repeated reference to one or other version of the principle in decisions of the Court, including recent decisions, suggests that it should be. However, for similar reasons as those given in relation to article 17 (1), it is sufficient to include it as an element in the formulation of the basic principle in article 16. There is no need for a separate paragraph or article.

Conclusions on articles 16, 17 and 19 (1)

34. For these reasons, it is proposed that articles 16, 17 and 19 (1) be merged into a single article, which might read as follows:

Article 16

Existence of a breach of an international obligation

> There is a breach of an international obligation by a State when an act of that State does not comply with what is required of it under international law by that obligation, regardless of the source (whether customary, conventional or other) or the content of the obligation.

(d) Article 18 (1) and (2): Requirement that the international obligation be in force for the State

35. Article 18 provides as follows:

> "1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.
>
> "2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.
>
> "3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.
>
> "4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

> "5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period."

36. Article 18 is a complex provision. It deals globally with the basic postulate that an act of a State is only wrongful if it breached an international obligation in force at the time that act was performed. The basic rule is stated in paragraph 1, but it is immediately qualified by reference to a special case involving *jus cogens* norms in paragraph 2, and is then further developed and particularized in relation to different classifications of wrongful act in paragraphs 3, 4 and 5. This is significant because these classifications reappear in article 25, and they are implicated in the overall treatment of different kinds of breaches in articles 24–26. Accordingly only paragraphs 1 and 2 of article 18 are considered here.

Government comments on article 18 (1) and (2)

37. Government comments are largely directed to later paragraphs of article 18, and the basic principle in article 18 (1) appears uncontroversial.[70] For Switzerland, however, that principle is "self-evident and does not need to be explained".[71]

Article 18 (1): the basic principle

38. Paragraph (1) states the basic principle that, for responsibility to exist, the breach must occur at a time when the obligation is in force for the State. This is but the application in the field of State responsibility of the general principle of the intertemporal law, as stated by Judge Huber in another context in the *Island of Palmas* case:

> "A judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute with regard to it arises or falls to be settled."[72]

39. The commentary to paragraph (1) notes the many cases in which the principle has been applied by international tribunals. But it goes further: "As this is a general principle of law universally accepted and based on reasons which are valid for every legal system, it ought necessarily to apply in international law also."[73] Moreover, in international law, it is not merely a necessary but a *sufficient* basis for responsibility; in other words, once responsibility has accrued as a result of a wrongful act, that is not affected by the subsequent termination of the obligation (whether as a result of the termination of the treaty or a change in international law).[74]

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[70] See the comments of Canada (*Yearbook ... 1980*, vol. II, Part One, p. 94), France (A/CN.4/488, p. 73), United Kingdom (ibid., pp. 47–48), United States (ibid., p. 48) and Germany (ibid., p. 73). See further below, para. 91.

[71] A/CN.4/488, p. 47.

[72] UNRIAA, vol. 2 p. 829, at p. 845 (1949), cited in the commentary to article 18, para. (7). Generally on the intertemporal law see the Resolution of the Institute of International Law, *Annuaire* ... vol. 56 (1975), at pp. 536–530; for the debate, ibid., pp. 339–374; for Sorensen's reports, ibid., vol. 55 (1973) pp. 1–116. See further, W. Karl, "The Time Factor in the Law of State Responsibility", in M. Spinedi and B. Simma (eds.), *United Nations Codification of State Responsibility* (Oceana, New York, 1987) p. 95.

[73] Commentary to article 18, para. (11).

[74] Ibid., para. (9). That proposition is expressly affirmed for treaty obligations in the Vienna Convention on the Law of Treaties, article 70.

40. Both aspects of the principle are implicit in the decision of the International Court in the *Case concerning Certain Phosphate Lands in Nauru*. Australia argued there that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947–1968) could not be brought decades later, even if the claim had not been formally waived. The Court rejected the argument, applying a liberal standard of laches or unreasonable delay.[75] But it went on to say that:

> "it will be for the Court, in due time, to ensure that Nauru's delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts *and the determination of the content of the applicable law*."[76]

Evidently the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken by Nauru itself, since its claim was based on a breach of the Trusteeship Agreement, which terminated at the date of its accession to independence in 1968. The gist of its claim was that the responsibility of Australia, once engaged under the law in force at a given time, continued to exist even if the primary obligation had terminated.[77] That principle, which was not questioned by Australia, has been applied in other cases [78] and is affirmed in the commentary.[79] But it is nowhere expressly set out in the draft articles. It is associated with the question of the loss of the right to invoke responsibility, and is discussed in reviewing the provisions of Part Two.

The principle of non-retrospectivity and the interpretation of human rights obligations

41. Although the basic principle is clearly correct, the question is whether it is subject to any qualifications or exceptions. One clear qualification relates to the question of continuing wrongful acts. It is dealt with in article 18 (3), which is discussed below.[80] Another possible qualification relates to the issue of human rights obligations. It has been suggested that "the intertemporal principle of international law, as it is commonly understood, does not apply in the interpretation of human rights obligations",[81] and reliance has been placed on a dictum of Judge Tanaka (dissenting) in the *South West Africa Cases (Second Phase)*. That case concerned a mandate obligation assumed by South Africa in 1920. The majority proceeded on the basis that:

> "in order to determine what the rights and obligations of the Parties relative to the Mandate were and are ... and in particular whether ... these include any right individually to call for the due execution of the 'conduct' provisions ... the Court must place itself at the point in time when the mandates system was being instituted, and when the instruments of mandate were being framed. The Court must have regard to

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[75] *Case concerning Certain Phosphate Lands in Nauru, I.C.J. Reports 1992*, p. 240, at pp. 253–255.

[76] *I.C.J. Reports 1992*, p. 240, at p. 255 (emphasis added). For comment, see R. Higgins, "Time and the Law" (1997), 46 *ICLQ* 501, at p. 514.

[77] More difficult problems might have been raised in respect of Nauru's claim against Australia in respect of the mining of phosphate lands under the period of the Mandate. See further C. Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (Melbourne, Oxford University Press, 1992); W. M. Reisman, "Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations", (1989) 10 *Michigan Journal of International Law* 231. The case was settled before the Court had the opportunity to consider these questions: *I.C.J. Reports 1993*, p. 322, and for the Settlement Agreement of 10 August 1993, see (1993) 32 ILM 1471.

[78] E.g. the *Rainbow Warrior* case, where the Arbitral Tribunal held that, although the relevant treaty obligation had terminated with the passage of time, France's responsibility for its earlier breach remained: see (1990) 20 UNRIAA 217 at pp. 265–266.

[79] Commentary to article 18, para. (9).

[80] See para. 100 below.

[81] R. Higgins, "Time and the Law" (1997) 46 *ICLQ* 501, at p. 517.

> the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably to be inferred, in the light of that situation ... Only on this basis can a correct appreciation of the legal rights of the Parties be arrived at."[82]

By contrast, Judge Tanaka said that:

> "In the present case, the protection of the acquired rights of the Respondent is not the issue, but its obligations, because the main purposes of the mandate system are ethical and humanitarian. The Respondent has no right to behave in an inhuman way today as well as during these 40 years."[83]

42. This "progressive" view of the obligations of a mandatory was affirmed by the new majority of the Court in the *Namibia Opinion,* in a well-known passage:

> "Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in article 22 of the Covenant ... were not static, but were by definition evolutionary, as also, therefore, was the concept of the sacred 'trust'. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last 50 years ... have brought important developments ... In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore."[84]

43. In the view of the Special Rapporteur, this statement does not qualify the principle stated in article 18 (1), still less does it create an exception to it. This is so for two reasons. First, the complaint against South Africa was not that it had violated the mandate in 1920 or 1930 but that it was doing so in 1966; in other words, it concerned continuing wrongful conduct in relation to an obligation assumed to continue in force. Secondly, the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The "progressive" or evolutionary interpretation of treaty provisions (including human rights treaties) is an established mode of interpretation,[85] although it is not the only such mode.[86] Interpretation of legal instruments over time is not an exact science, but this has nothing

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[82] *I.C.J. Reports 1966*, p. 6, at p. 23 (para. 16).

[83] *I.C.J. Reports 1966*, p. 6, at p. 294, cited with approval by Higgins, loc. cit, at pp. 516–517.

[84] *I.C.J. Reports 1971*, p. 16, at pp. 31–32 (para. 53).

[85] See, e.g., the dictum of the European Court of Human Rights in the *Tyrer* case, *ECHR Ser. A*, vol. 26 (1978), at pp. 15–16.

[86] Reference to the *travaux préparatoires* of treaties, as permitted by article 32 of the Vienna Convention on the Law of Treaties of 1969, necessarily points the interpreter to the understanding of the treaty provision at the time of its adoption, and thus stands in tension with progressive interpretation. But it is used for the interpretation of human rights treaties.

to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct.[87]

Conclusion as to article 18 (1)

44. For these reasons, the principle expressed in article 18 (1) should be retained. As to its formulation, it may be more in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility if it were expressed in the form "No act of a State shall be considered internationally wrongful unless ..."[88] The *lex specialis* principle (expressed in article 37 of the draft articles) is sufficient to deal with those rare cases where it is agreed or decided that responsibility will be assumed retrospectively.[89]

Article 18 (2): emerging peremptory norms

45. The only express qualification to the principle underlying article 18 (1) is that in paragraph (2). This contemplates that an act which was unlawful at the time it was committed will be considered lawful if that act is subsequently *required* by a peremptory norm of international law. In such cases the peremptory character of the norm extends, as it were, backwards in time, at least to the extent that it reverses the earlier characterization of the conduct as wrongful. This is described in the commentary as concerning certain "hypothetical cases which do not happen to have arisen in the past and are likely to arise only very rarely in the future, but which nevertheless cannot be ruled out".[90] The justification is stated in the following terms:

> "Where an act of the State appeared, at the time of its commission, to be wrongful from the formal legal point of view, but turns out to have been dictated by moral and humanitarian considerations which have since resulted in a veritable reversal of the relevant rule of law, it is difficult not to see retrospectively in that act the action or omission of a forerunner. And if the settlement of the dispute caused by that act comes after the change in the law has taken place, the authority responsible for the settlement will be loath to continue treating the earlier action or omission as internationally wrongful in spite of everything, and to attach international responsibility to it."[91]

The commentary goes on to illustrate some possibilities. For example:

> "it is not inconceivable that an international tribunal might now be called upon to settle a dispute concerning the international responsibility of a State which, being bound by a treaty to deliver arms to another State, had refused to fulfil its obligation, knowing that the arms were to be used for the perpetration of aggression or genocide or for maintaining by force a policy of apartheid and had done so before the rules of *jus*

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[87] Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account. Take, for example, the obligation to ensure that persons accused are tried without undue delay (International Covenant on Civil and Political Rights, article 14 (c)). If, when that obligation enters into force for a State, accused persons have already been imprisoned awaiting trial for a long time, this could be relevant in deciding whether a breach had been committed, but no compensation could be awarded in respect of the period prior to the entry into force of the obligation: see J. Pauwelyn, "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems", *BYIL*, vol. 66, 1995, at pp. 443–445.

[88] For the proposed language of article 18 see para. 156 below.

[89] As to the retroactive effect of the acknowledgement and adoption of a conduct by a State, see draft article 15 *bis* and First Report, A/CN.4/490/Add.5, paras. 281–286.

[90] Commentary to article 18, para. (14).

[91] Ibid., para. (15).

> *cogens* outlawing genocide and aggression had been established, thus making the refusal not only lawful, but obligatory."[92]

But it is stressed that the retrospective effect of a new peremptory norm is very limited: "the act of the State is not retroactively considered as lawful *ab initio*, but only as lawful from the time when the new rule of *jus cogens* came into force", and it has no effect on decisions or agreed settlements already reached.[93] This limited effect is expressed by the words "ceases to be considered an internationally wrongful act" in paragraph (2).

Comments by Governments on article 18 (2)

46. France disagrees with paragraph (2), on grounds related to its general reservations about peremptory norms; it also says that an obligation to act "has no place in an article on intertemporal law".[94] The Netherlands, in an earlier comment, suggested that article 18 (2), if it belongs at all in the draft articles, belongs in Chapter Five in the context of circumstances precluding wrongfulness.[95]

Is there a need for article 18 (2)?

47. The situation contemplated in paragraph (2) must be even less common than that contemplated in article 64 of the Vienna Convention on the Law of Treaties, which deals with the continued validity of treaties when a new conflicting norm of *jus cogens* comes into existence. Article 18 (2) contemplates nothing less than that an act, specifically *prohibited* by international law on Day 1, should itself have become *compulsory* by virtue of a new norm of *jus cogens* on Day 2, or at least within such a period of time as to allow issues of responsibility arising on Day 1 to remain live but unresolved. Not even the slavery cases provide an example of this situation.[96]

48. Given the limited form of retrospectivity contemplated, and the extreme unlikelihood of such cases occurring, the question must be asked why these cases are not sufficiently dealt with by the combination of article 37 (the *lex specialis* provision), article 43 (b) (excluding restitution contrary to a peremptory norm of international law) and, finally, the flexibility inherent in the assessment of compensation. For example, in the slavery cases, assuming a wrongful seizure of slaves at a time when the slave trade remained internationally lawful,[97] there could be no question either of restitution of the slaves or of compensation for their loss, since what was lost (ownership of human beings) had become incapable of valuation in international law. As to the examples of aggression and genocide, these have been recognized as peremptory, in substance, for the whole of the Charter

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[92] Ibid., para. (17).

[93] Ibid., para. (18).

[94] A/CN.4/488, p. 49.

[95] *Yearbook ... 1981*, vol. II, Part 1, p. 103.

[96] As the commentary to article 18, para. (16) notes. The slavery cases did raise important issues of intertemporal law: see the cases cited in the commentary at para. 10.

[97] The point of time at which a new rule of customary international law comes into existence can be a difficult question, as it was in the slavery cases: see, e.g., *The Le Louis* (1817), 2 Dods 210; *The Antelope* (1825), 10 Wheaton 66. In practice, such rules are regarded as effective from an early date, and in this sense an element of "retrospectivity" is built into the law-determining process.

period.[98] It is difficult if not impossible to think of any actual case which could turn on the illegality of former conduct now required by a peremptory norm; or even, for that matter, the legality of former conduct now prohibited by such a norm.

Effect of new peremptory norms under the 1969 Vienna Convention

49. A further point to note is that, while the Vienna Convention on the Law of Treaties contemplates that new peremptory norms may come into existence, it does not give them any retrospective effect.[99] Article 64 provides that, if a new peremptory norm of general international law emerges, "any existing treaty which is in conflict with that norm becomes void and terminates". Article 71 (2) provides that:

> "2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:
>
> (a) Releases the parties from any obligation further to perform the treaty;
>
> (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law."

This solution avoids outright retrospectivity, but at the same time respects the demands of the new peremptory norm in that rights (for example, the right to restitution arising from an earlier wrongful act) which cannot be maintained consistently with the new norm are abrogated. This consequence a new peremptory norm would have, independently of the secondary rules of State responsibility.[100]

Conclusion as to article 18 (2)

50. Ultimately, paragraph (2), as it is formulated, seems to relate more to the question of the response which a later authority (a court or tribunal) should make to a situation of responsibility arising at an earlier time, in the light of a later inconsistent peremptory rule, than it does to the question of responsibility at that earlier time. According to the commentary, the earlier conduct was actually a breach of an obligation.[101] Nonetheless, the secondary relationship of responsibility thereby arising is negated by a later peremptory norm in certain particular cases.

51. Seen in this way, paragraph (2) raises two different issues, neither of which is properly located in an article which deals with the effect of the intertemporal law on the origins of responsibility. The first is the consequence for an existing responsibility relationship of subsequent changes in the primary rules (especially where these involve new peremptory norms). That relates to Part Two of the draft articles, and has no place in Part One. The second, more important issue is the relationship between the origins of responsibility and

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[98] The Nürnberg principles criminalized the waging of aggressive war as of 1939, and those principles were affirmed by the General Assembly in 1948. The International Court in the *Genocide Convention* case said that the principles underlying the Convention "are recognized by civilized nations as binding on States, even without any conventional obligation": *I.C.J. Reports 1951*, p. 15, at p. 23.

[99] A point noted by Sweden in commenting on article 18 (2): *Yearbook ... 1981*, vol. II, Part 1, p.78.

[100] It is also consistent with the well-known proviso to Arbitrator Huber's dictum in the *Island of Palmas* case, UNRIAA, vol. 2, p. 829, at p. 845.

[101] Commentary to article 18, para. (18).

the overriding demands of peremptory norms, and that issue arises also, and in practice more often, with respect to existing peremptory norms. It will be discussed further in considering the circumstances precluding wrongfulness in Chapter 5 of Part One. For these reasons, paragraph (2) is unnecessary *as an aspect of article 18*, and can be deleted.

(e) Articles 20 and 21: Obligations of conduct and obligations of result

52. Articles 20 and 21 draw a distinction between obligations of conduct and obligations of result.[102] Because of the link between the two, the articles should be considered together. They provide as follows:

> "*Article 20*
>
> "*Breach of an international obligation requiring the adoption of a particular course of conduct*
>
> "There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.
>
> "*Article 21*
>
> "*Breach of an international obligation requiring the achievement of a specified result*
>
> "1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.
>
> "2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation."

53. The commentary to these articles notes that, while the distinction may be difficult to apply in specific cases, it is "of fundamental importance in determining how the breach of an international obligation is committed in any particular instance".[103] This is so because it affects both whether, and when, a breach of obligation may be judged to have occurred. In particular, "the conditions in which an international obligation is breached vary according to whether the obligation requires the State to take some particular action or *only* requires it to achieve a certain result, while leaving it free to choose the means of doing so".[104] The essential basis of the distinction is that obligations of conduct, while they will have some purpose or result in mind, determine with precision the means to be adopted; hence they are sometimes called obligations of means. By contrast, obligations of result do not do so, leaving it to the State party to determine the means to be used.[105] This does not mean that

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[102] This has attracted a considerable literature. See, e.g., J. Combacau, "Obligations de résultat et obligations de comportement: quelques questions et pas de réponse", in *Mélanges Reuter*, pp. 181–204; P. Daillier et A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 6th ed., 1999, paras. 139, 473; P. M. Dupuy, "Le fait générateur de la responsabilité internationale des Etats" (1984), vol. 188, *Recueil des cours*, pp. 43–54; I. Brownlie, *State Responsibility — Part I* (1983) p. 241; C. Tomuschat, "What is a 'Breach' of the European Convention on Human Rights", in *Essays in Honour of Henry G. Schermers* (vol. 3, 1994) p. 315; E. Wyler, *L'illicite et la condition des personnes privées* (A. Pedone, Paris, 1995), pp. 17–43.

[103] Commentary to article 20, para. (4).

[104] Ibid.

[105] Ibid., para. (8).

the State has a free choice of means. Its choice may be constrained, more or less. But it will have a degree of choice, and indeed in some cases, it may have a further choice, to remedy the situation if no irrevocable harm has been done by a failure of the means originally chosen.[106] For example, the adoption of a law, while it may appear inimical to the result to be achieved, will not actually constitute a breach; what matters is whether the legislation is actually applied. In such cases, the breach is not committed until the legislation is definitively applied in the particular case, producing the prohibited result.[107]

54. The commentary accepts that which type of obligation should be imposed in any case is not a matter for the draft articles but for the authors of the primary rule. Obligations of conduct (involving either acts or omissions) are more likely to be imposed in the context of direct State-to-State relations, whereas obligations of result predominate in the treatment of persons within the internal legal order of each State.[108] In this sense the distinction is implicated with a view of the State and of sovereignty: a choice of means is more likely to exist in internal than in international matters. But this is not a hard and fast rule. For example, a uniform law treaty is conceived as imposing an obligation of conduct, to make the provisions of the uniform law a part of the law of the State concerned.[109] Obligations in the field of human rights, on the other hand, involve obligations of result, since they do not prescribe precisely how the relevant rights are to be respected, and they are consistent with a diversity of laws and institutions.

55. Articles 20 and 21 thus take a distinction between different types of obligation established by the primary rules and seek to develop the consequences of that distinction in terms of responsibility.[110] According to the commentary, the principal consequence for the purposes of articles 20 and 21 is that:

> "[t]he existence of a breach of an obligation of [result] is thus determined in international law in a completely different way from that followed in the case of an obligation 'of conduct' or 'of means' where ... the decisive criterion for concluding that the obligation has been fulfilled or breached is a comparison between the particular course of conduct required by the obligation and the conduct actually adopted by the State."[111]

Government comments on articles 20 and 21

56. Those Governments that have commented on articles 20 and 21 are sceptical of the value of the distinction. Denmark (on behalf of the Nordic countries) notes that the distinctions developed in Chapter III "do not appear to have any bearing on the consequences of their breach as developed in Part Two."[112] France notes that these provisions relate to

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[106] Ibid., paras. (2)–(4).

[107] Commentary to article 21, paras. (18)–(22), citing the *Mariposa Development Company* case (1933), 6 UNRIAA 340 (United States-Panama General Claims Commission), *Certain German Interests in Polish Upper Silesia, P.C.I.J. Ser. A*, No. 7 (1926), at p. 19, and the decision of the European Court in the *De Becker* case, *ECHR Ser. A*, vol. 4 (1962).

[108] Commentary to article 20, para. (6).

[109] Ibid., para. (8). See B. Conforti, "Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme", *Rivista di diritto internazionale privato e processuale*, vol. 24, 1988, p. 233.

[110] Commentary to article 20, para. (5).

[111] Ibid.

[112] A/CN.4/488, p. 66.

"rules of substantive law, which classify primary obligations"; such provisions have "no place in a draft of this kind and should be deleted".[113] Germany states that:

> "there is a certain danger in establishing provisions that are too abstract in nature, since it is difficult to anticipate their scope and application. Such provisions, rather than establishing greater legal certainty, might be abused as escape clauses detrimental to customary international law. They may also seem impractical to States less rooted in the continental European legal tradition, because such abstract rules do not easily lend themselves to the pragmatic approach normally prevailing in international law ... In sum, the German Government is not quite sure whether the complicated differentiations set out in articles 20, 21 and 23 are really necessary, or even desirable."[114]

The United Kingdom is concerned that "the fineness of the distinctions drawn between different categories of breach may exceed that which is necessary, or even helpful, in a statement of the fundamental principles of State responsibility [and] that it may be difficult to determine the category into which a particular conduct falls".[115] As to article 21 in particular, while it regards the basic propositions as "uncontroversial", it rejects the interpretation given to them in the commentary, especially as concerns obligations with respect to the treatment of foreigners and their property.[116]

Relationship between the distinction as applied in national and international law

57. The distinction between obligations of conduct and result derives from civil law systems. It is not known to the common law; hence, perhaps, the limited treatment of it in the English literature.[117] The function of the distinction, for example in French law, is lucidly explained by Combacau:

> "It is ... the degree of probability of the achievement of the creditor's objective which controls the nature of the obligation imposed on the debtor: where its achievement is highly probable, the law or contract institutes obligations of result; where [the achievement of the objective] is essentially more unpredictable, [the law or contract] limits itself to reducing the risk and engaging only an obligation of means."[118]

In other words, in the civil law understanding, obligations of result involve in some measure a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations, obligations to do all in one's power to achieve a result, but without ultimate commitment. Thus a doctor has an obligation of conduct towards a patient, but not an obligation of result; the doctor must do everything reasonably possible to ensure that the patient recovers, but does not undertake that the patient *will* recover. Under this conception, it is clear that obligations of result are more onerous, and breach of such obligations correspondingly easier to prove, than in the case of obligations of conduct or means.

58. By contrast, in the form presented by articles 20 and 21 and explained in the commentary, the distinction is drawn on the basis of determinacy, not risk. An obligation of conduct is an obligation to engage in more or less determinate conduct. An obligation

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[113] Ibid., p. 67.

[114] Ibid.

[115] A/CN.4/488, p. 46.

[116] Ibid., pp. 68–69. Article 20, on the other hand, could in its view be merged with article 16: ibid., p. 47.

[117] Cf. Brownlie, ***State Responsibility — Part I*** (1983), at p. 241.

[118] Combacau, loc. cit., p. 196. See also Dupuy, loc. cit., pp. 47–48. See generally K. Zwiegert and H. Kotz (trans. A. Weir), *An Introduction to Comparative Law* (Oxford, Clarendon, 2nd ed., 1992), p. 538.

of result is one that gives the State a choice of means.[119] It is for this reason that obligations of result are treated in the commentary as in some way *less* onerous than obligations of conduct, where the State has little or no choice as to what it will do.[120] In international law:

> "The root of the distinction lies henceforth in the degree of freedom allowed the obligated party in the choice of means by which it may fulfil the obligation, and no longer in the more or less unpredictable nature of the expected result."[121]

The difference is worth noting. In adopting what was originally a civil law distinction, the draft articles have nearly reversed its effect. But of course it does not follow that a distinction which has a clear meaning and rationale in national legal systems will necessarily be applied in the same way in international law. It is necessary to treat the issue in the terms adopted by the draft articles, even if these are not those of any particular system of national law.

The distinction between obligations of conduct and result in the legal literature

59. Even those writers familiar with the distinction as it is drawn in civil law systems express serious doubts as to its usefulness in the draft articles. According to Tomuschat, for example,"[d]ifficult to apply, the distinction between obligations of conduct and obligations of result provides little help to those having to determine whether a breach of an international obligation has occurred."[122] The impact that the distinction may have on the determination of the time factor in the commission of an internationally wrongful act has often been mentioned.[123] Most writers, however, consider the distinction to be of limited value. For example, it has been stressed that "there is not always a clear-cut line between the two types of obligations, in addition to the fact that they may be intertwined to such an extent that they lose their distinguishing features".[124] Overall, there is little support in the literature for retaining this distinction, at least in the manner adopted on first reading. Even

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[119] Commentary to article 20, para. (2), and to article 21, para.(1). See also Daillier et Pellet, (*Droit international public*, 6th ed., 1999), referring to the "permissiveness with regard to means" as the decisive criteria of the distinction (p. 746, para. 473).

[120] Thus B. Stern, "Responsabilité internationale", *Répertoire international Dalloz*, 1998, para. 64, describing the obligation of conduct incumbent to a State as "more restrictive, since it has both the obligation to achieve a certain result and the obligation to use, in so doing, certain means established by international rules".

[121] Combacau, loc. cit., pp. 201–202.

[122] "What is a 'Breach' of the European Convention on Human Rights" in *Essays in Honour of Henry G. Schermers*, p. 335. See also P. M. Dupuy, "Le fait générateur de la responsabilité internationale des États" (1984), vol. 188, *Recueil des cours*, p. 47 and G Lysén, for whom "it would seem that the proposals by the ILC do not provide any workable tools but rather contribute to confusion": *State Responsibility and International Liability of States for Lawful Acts. A Discussion of Principles* (Iustus Förlag, Uppsala, 1997), p. 63.

[123] For Daillier and Pellet, in the case of an obligation of result, "It is necessary to ... *wait* until the various stages of a 'complex ... State act' have run their course before a breach of an international obligation can be determined" (loc. cit., p. 748, para. 473; emphasis added). See also J. Combacau, loc. cit., p. 184, and P. M. Dupuy, loc. cit., pp. 44–45.

[124] G. Lysén, loc. cit., p. 62, who also refers to articles 194 and 204 (1) of the Law of the Sea Convention, previously analysed for the same purposes by P. M. Dupuy (loc. cit., pp. 49–50). Examining the criteria as defined in the commentaries to articles 20 and 21, J. Combacau states that "the obligations of result in article 21 come down to a single type, and they are not easily distinguishable from the obligations of conduct in article 20" (loc. cit., p. 190).

though Combacau believes the distinction to be "indispensable in principle",[125] he concludes his study by questioning ...

> "the validity of notions such as means, conduct, result, objective ... being applied to rules in cases where what at first appears to be the result of a behaviour is itself a behaviour, and where each of the means offered to the party fulfilling the obligation still provides for a choice of means."[126]

The distinction between obligations of conduct and result in international case law

60. Given this indifferent response to articles 20 and 21, the question must be whether courts and tribunals have nonetheless found the distinction useful in deciding actual cases. In practice those articles have only occasionally been referred to. The distinction between obligations of conduct and of result was not adverted to in the *Diplomatic and Consular Personnel* case, for example. But three cases may be mentioned in which the distinction was used, to some extent at least.

61. In the *Colozza* case,[127] the European Court of Human Rights was concerned with the trial *in absentia* of the claimant, who had no actual notice of the trial, was sentenced to six years' imprisonment and had not been allowed subsequently to contest his conviction. He claimed that he had not had a fair hearing, contrary to article 6 (1) of the Convention. The Court noted that:

> "The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of article 6 (1) in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved ... For this to be so, the resources available under domestic law must be shown to be effective and a person 'charged with a criminal offence' who is in a situation like that of Mr. Colozza must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*."[128]

The Court thus held that the applicant's case "was at the end of the day never heard, in his presence, by a 'tribunal' which was competent to determine all the aspects of the matter."[129] But, as Tomuschat points out, it reached this conclusion not simply by comparing the result required (the opportunity for a trial in the accused's presence) with the result practically achieved (the lack of that opportunity in the particular case). Rather the Court examined what more Italy could have done to make the applicant's right "effective".[130] It is true that the obligation of result embodied in article 6 (1) might be expressed as an obligation to provide an effective right to be tried in one's presence, but that simply reformulates the question to be decided. It is doubtful whether the distinction between obligations of conduct and result assisted the Court to decide that question.

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[125] Loc. cit., p. 184.

[126] Ibid., p. 204.

[127] *ECHR, Ser. A*, vol. 89 (1985).

[128] Ibid., at para. 30, citing *De Cubber, ECHR, Ser. A*, vol. 86 (1984), p. 20 (para. 35). Compare *Plattform 'Ärzte für das Leben'*, in which the Court gave the following interpretation of article 11:

> "While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used ... In this area the obligation they enter into under article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved".

ECHR, Ser. A, vol. 139 (1988), para. 34. In the *Colozza* case, by contrast, the Court used similar language but concluded that the obligation was an obligation of result.

[129] *ECHR, Ser. A*, vol. 89 (1985), at para. 32.

[130] Ibid., at para. 28.

62. Perhaps a more interesting example was the *ELSI* case, decided by a Chamber of the Court including Judge Ago. The principal question there was whether the requisition of ELSI's plant by the Mayor of Palermo (which led to ELSI's bankruptcy and subsequent forced sale of assets at an undervaluation) was in breach of various provisions of a bilateral FCN Treaty and Supplementary Agreement. The United States relied, *inter alia*, on article I of the Supplementary Agreement, which provided that:

> "The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in: (a) preventing their effective control and management of enterprises ... or, (b) impairing their other legally acquired rights and interests in such enterprises ..."

The requisition of the plant was subsequently held to be unlawful under Italian law and damages were awarded by the Italian courts. But the United States argued that, the requisition having been the actual trigger for the liquidation, those damages did not reflect the actual loss. Accordingly the requisition was an arbitrary measure contrary to article I.

63. In his dissenting opinion, Judge Schwebel supported this conclusion by reference to the distinction between obligations of conduct and result as embodied in articles 20 and 21. He classified article I as embodying an obligation of result, on the ground that:

> "The particular objects of the obligation not to subject such corporations to arbitrary or discriminatory measures are very specifically set out. But the particular means of achieving these objects are not. Thus ... the obligation of article I would seem to be an obligation not of means but of result, as international treaty obligations concerning the protection of aliens and their interests normally are. Nevertheless, it does not follow ... that Italy is absolved of its arbitrary treatment of ELSI and the interests of its shareholders in ELSI by reason of the administrative and judicial proceedings which followed the requisition ... In the current case, Italy did not achieve the specified result, namely relieving ELSI of the effects of the arbitrary measure of requisition. It did not achieve the specified result in general, or in respect of the very particular objects set out in subparagraphs (a) and (b) of article I ...
>
> "It may of course be maintained that, even in the absence of the requisition, ELSI would have gone bankrupt ... But this conclusion does not take account of the fact ... that, if the requisition had not been imposed when it was imposed, ELSI would have been enabled to realize materially more from its assets than in fact was realized ... It accordingly follows that ELSI was not placed in the position it would have been in had there been no requisition. The equivalent result was not attained by Italian administrative and judicial processes, however estimable they were. Thus, in my view, those processes do not absolve Italy of having committed an arbitrary act within the meaning of the Treaty's Supplementary Agreement."[131]

By contrast, the Chamber reached the opposite conclusion without any analysis of the distinction. It held, first, that ELSI's loss of control over its assets, looking at the matter broadly and realistically, resulted from its insolvency and not from the requisition. Secondly, however, article I was to be read as a general prohibition of "arbitrary or discriminatory measures", not limited to the specific purposes set out. The reason there had been no breach of article I, in the Chamber's view, was that the Mayor's decision, albeit unlawful under

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[131] *I.C.J. Reports 1989*, p. 15, at pp. 117, 121.

Italian law, was not "arbitrary" in the sense of article I.[132] Thus the majority did not need to decide whether the opportunity for appeal from that decision remedied the arbitrariness. Rather the fact that the decision "was consciously made in the context of an operating system of law and of appropriate remedies of appeal" was a reason for not judging it to be arbitrary in the first place.[133]

64. One can agree with Judge Schwebel that, if the requisition had been considered "arbitrary", and if it was the real cause of ELSI's loss, then the limited damages obtained some years later from the Italian courts would not have "cured" the breach. But how did it affect the outcome of the case to classify article I as an obligation not to produce the result of arbitrary treatment, as distinct from an obligation (of conduct or of means) not to engage in arbitrary conduct? There seems to have been a difference between the majority and the minority as to the interpretation of the term "arbitrary" in article I, and there was certainly a difference between them in the appreciation of the facts. But it does not seem that the distinction between obligations of conduct and result made any difference in either of these respects, or actually contributed to an analysis of the issues.

65. A third example is the recent decision of the Iran-United States Claims Tribunal in *Islamic Republic of Iran v. United States of America, Cases Nos. A15(IV) and A24*.[134] The case involved an Iranian claim that the United States had breached its obligation, under General Principle B of the General Declaration contained in the Algiers Accords of 19 January 1981, "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its State enterprises ... and to bring about the termination of such claims through binding arbitration". Rather than terminate cases pending before its courts, the United States acted to suspend them, the suspension to be lifted upon a decision of the Tribunal that it lacked jurisdiction over the claim.[135] The United States argued that this was the only practical method available to it, and that the linking of the termination of legal proceedings and of claims in General Principle B showed that its approach was reasonable. In other words (though neither party used the terminology of articles 20 and 21), it argued that General Principle B embodied an obligation of result — the result being the termination of pending proceedings — and that the means adopted within its own legal system were adequate to achieve that result in practice. This is reminiscent of the view, expressed in the commentary to article 21, that obligations of result are in some sense less onerous than obligations of conduct because of the element of discretion in achieving the result that is left to the State concerned.

66. The Tribunal held, on the interpretation of the Declaration, that the obligation to terminate litigation applied only to cases falling within its own jurisdiction, but that the obligation to terminate cases that did fall within its jurisdiction was not satisfied by mere suspension. In reaching this conclusion, it was not enough to rely on the apparently clear language of the Declaration:

> "The Tribunal must analyse the matter further. Obligations under General Principle B are, generally speaking, obligations of 'result', rather than of 'conduct' or 'means'. Although it could be said that the United States, by suspending the litigation rather than terminating it, failed to comply with its obligations under the Algiers

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[132] Ibid., at pp. 72, 75–77 (paras. 121, 126–130).

[133] Ibid., p. 77 (para. 129).

[134] Award No. 590-A15(IV)/A24-FT, 28 December 1998. This was a decision of the Full Tribunal (Skubiszewski, President; Broms, Arangio-Ruiz, Noori, Aldrich, Ameli, Allison, Aghahosseini, Duncan, Members).

[135] See *Dames & Moore* v. *Regan*, 453 US 654 (1981).

> Declarations, the Tribunal cannot confine itself to a strictly literal or grammatical interpretation of those Declarations but must also test the method chosen by the United States ... against the object and purpose of those Declarations. The answer to the question whether suspension fulfilled the function of termination depends on practice. Thus, the test is in factual evidence.
>
> > Unless otherwise agreed by treaty, general international law permits a State to choose the means by which it implements its international obligations within its domestic jurisdiction. Nonetheless, a State's freedom with respect to the choice of the means for implementing an international obligation is not absolute. The means chosen must be adequate to satisfy the State's international obligation, and they must be lawful."[136]

The Tribunal went on to hold that, "by adopting the suspension mechanisms provided for in Executive Order 12294, the United States adhered to its obligations under the Algiers Declarations only if, in effect, the mechanism resulted in a termination of litigation as required by those Declarations".[137] The test of whether the litigation had been "in effect" terminated was whether the Islamic Republic of Iran was "reasonably compelled in the prudent defense of its interests to make appearances or file documents in United States courts subsequent to 19 July 1981" in respect of pending litigation within the jurisdiction of the Tribunal, or any other claims filed with the Tribunal until they were dismissed for want of jurisdiction.[138] The costs of such prudent defence, including the reasonable costs of monitoring suspended cases, would be recoverable in a second phase of the proceedings.

67. Pending the determination of these factual issues, the case is incomplete, and detailed comment on it would not be appropriate. Two points can be made, however. First, the Tribunal did apply the distinction between obligations of conduct and result, very much in the way envisaged in the commentary to articles 20 and 21 (though it made no reference to those articles). The effect of doing so was to give the United States some flexibility in the way it implemented General Principle B, though it was still required to produce the "result" of termination for cases within the jurisdiction of the Tribunal.[139] Secondly, the Tribunal reached its conclusions exclusively by the interpretation of the relevant agreements in their context and having regard to their object and purpose; in other words, at that stage of the proceedings it was not concerned with the secondary rules of responsibility at all. To that extent the decision confirms that the distinction between obligations of conduct and result concerns the classification of primary obligations, i.e. it concerns primary not secondary rules of responsibility. Thirdly, however, it is not apparent that the Tribunal's decision would have been any different in substance, if not in form, had it classified the obligation as an obligation of conduct (the conduct of terminating the litigation) rather than an obligation of result (the result of the litigation being terminated). Presumably, the same considerations would have applied to the obligation in either case.

68. This brief review suggests that the distinction between obligations of conduct and result can be used as a means of the classification of obligations, but that it is not used with

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[136] Award No. 590-A15(IV)/A24-FT, at para. 95.

[137] Ibid., at para. 99.

[138] Ibid., at para. 101.

[139] Thus, the Tribunal held, for the United States to allow new cases to be filed solely for the purposes of tolling limitations was a breach of General Principle B: tolling limitations could have been lawfully achieved by means other than allowing the filing of suit, but General Principle B specifically prohibited "all further litigation" in claims within the Tribunal's jurisdiction for any reason at all. Ibid., at para. 131.

much consistency. In each case the question was one of interpretation of the relevant obligation, and the value of the distinction lies in its relevance to the measure of discretion left to the respondent State in carrying out the obligation. That discretion was necessarily constrained by the primary rule, and the crucial issue of appreciation was, to what extent? The distinction may help in some cases in expressing conclusions on this issue: whether it helps in arriving at them is another matter.

Human rights obligations as "obligations of result"

69. The commentary to article 21 insists that standard obligations as to the treatment of persons by the State, whether in the field of human rights or diplomatic protection, involve what might be called "extended obligations of result", and that they are covered by article 21 (2). The consequence is that these obligations are not breached by the enactment of legislation until that legislation is definitively given effect. In other words, it is the application of the legislation in the particular case, taken together with the subsequent failure of the State to remedy any resulting grievance, that constitutes the breach. Until then, the breach is merely apprehended. This view is graphically represented by Combacau in the following terms:

> "when the International Covenant on Civil and Political Rights provides, on the one hand, that 'No one shall be subjected to arbitrary arrest or detention' ... and, on the other hand, that 'Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation' ... it lays down two rules that have as their counterpart in domestic law two State obligations, the one primary and the other subsidiary; however, with regard to international law, it establishes only one, which provides that the State cannot lawfully fail to comply successively with both of these domestic obligations, and which — admitting the somewhat unpleasant nature of this formulation — is ultimately interpretable as follows: 'No State may arbitrarily arrest or detain an individual *without offering him or her compensation*'."[140]

But human rights courts and committees do not treat these rights in this way, as the following brief and selective survey shows.

70. Under the European Convention on Human Rights of 1950, petitions may be lodged by "any person, non-governmental organization or group of individuals claiming to be the victim of a violation" of the rights in the Convention. In addition, inter-State cases may be referred to the Court in relation to "any alleged breach of the provisions of the Convention" and Protocols.[141] Article 41 provides that:

> "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

This clearly implies that a violation of the Convention can be established prior to and independently of the question whether reparation for such a violation is available under the relevant internal law. And that proposition has never been doubted by the Convention organs. As the Court said in one case:

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[140] J. Combacau, "Obligations de résultat et obligations de comportement: quelques questions et pas de réponse", in *Mélanges Reuter*, p. 181, at p. 191 (emphasis added). *Contra*, see for example R. Higgins, "International Law and the Avoidance, Containment and Resolution of Disputes. — General Course on Public International Law", *RCADI*, 1991-V, vol. 230, pp. 203–204.

[141] European Convention on Human Rights (as amended by Protocol 11), articles 34, 35. Local remedies must be exhausted, and a petition must be brought "within a period of six months from the date on which the final decision was taken": article 35.

> "Article 25 [now 34] of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it ..."[142]

71. The International Covenant on Civil and Political Rights of 1966 likewise distinguishes between individual and inter-State communications. Under the Optional Protocol, individuals subject to the jurisdiction of a State party to the Protocol who "claim to be victims of a violation by that State Party" of rights set forth in the Covenant may present communications to the Human Rights Committee.[143] In considering those communications, the Committee has always required that the impact of State action be such that the person concerned is individually a "victim", and it has refused to examine State legislation in the abstract. On the other hand, it does not require that a victim should necessarily have been prosecuted or otherwise penalized. In certain cases the mere existence of legislation may involve a breach of the Convention; in other cases a sufficiently imminent and direct threat of action will justify treating a person as a victim. The test has been summarized in the following words:

> "provided each of the authors is a victim within the meaning of article 1 of the Optional Protocol, nothing precludes large numbers of persons from bringing a case under the Optional Protocol. The mere fact of large numbers of petitioners does not render their communication an *actio popularis* ... For a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice."[144]

These limitations derive from the provisions of the Optional Protocol, as interpreted by the Committee. Inter-State communications are subject to a different formula. Under article 41 of the Covenant, such communications may be brought by a State Party which has accepted the procedure and which claims that another such State Party "is not fulfilling its obligations".[145] So far this procedure has not been used, but it could conceivably involve a challenge to a law as such.

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[142] *Norris Case, ECHR Ser. A*, vol. 142 (1988), para. 31, citing *Klass Case*, ibid., vol. 28 (1978), at para. 33; *Marckx Case*, ibid., vol. 31 (1979), at para. 27; *Johnston Case*, ibid., vol. 28 (1978), at para. 33. See also, *inter alia*, *Dudgeon Case*, ibid., vol. 45 (1981), para. 41; *Modinos Case*, ibid., vol. 259 (1993), at para. 24.

[143] Optional Protocol, article 1. The exhaustion of local remedies rule applies: article 5 (2) (b).

[144] *E.W. and Others v. Netherlands*, CCPR/C/47/D/429/1990 (1993), paras. 6.3–6.4. See also, *inter alia*, *Aumeeruddy-Cziffra v. Mauritius*, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), at p. 134 (1981), para. 9.2; *Hertzberg and Others v. Finland*, Ibid., *Thirty-seventh Session, Supplement No. 40* (A/37/40), at p. 161 (1982), para. 9.3; *Disabled and handicapped persons in Italy v. Italy*, Ibid., *Thirty-ninth Session, Supplement No. 40* (A/39/40), at p. 197 (1984), para. 6.2; *Ballantyne and Others v. Canada*, CCPR/C/47/D/359/1989 and 385/1989/Rev. 1 (1993), para. 10.4 ("where an individual is in a category of persons whose activities are, by virtue of the relevant legislation, regarded as contrary to law, they may have a claim as 'victims' within the meaning of article 1 of the Optional Protocol"); *Toonen v. Australia*, CCPR/C/50/D/488/1992 (1994), para. 5.1; *Bordes and another v. France*, CCPR/C/57/D/645/1995 (1996) paras. 5.4–5.5.

72. The Inter-American Court of Human Rights applies essentially the same principle in determining whether there has been a breach of the American Convention on Human Rights of 1969. In its advisory opinion on *Compatibility of Draft Legislation with Article 8 (2) (h) of the American Convention on Human Rights*, the Inter-American Court was asked several general questions arising from a controversy about a draft law which, if enacted, would have clearly violated commitments of the State concerned under the Convention. On the question whether a mere law could of itself violate an obligation of result, the Court said:

> "a law that enters into force does not necessarily affect the legal sphere of specific individuals. The law may require subsequent normative measures, compliance with additional conditions, or, quite simply, implementation by State authorities before it can affect that sphere. It may also be, however, that the individuals subject to the jurisdiction of the norm in question are affected from the moment it enters into force. Non-self-executing laws simply empower the authorities to adopt measures pursuant to them. They do not of themselves constitute a violation of human rights. In the case of self-executing laws ... the violation of human rights, whether individual or collective, occurs upon their promulgation. Hence, a norm that deprives a portion of the population of some of its rights — for example, because of race — automatically injures all the members of that race ..."[146]

After analysing the specific provisions of the Convention, and referring with approval to the European jurisprudence, the Court concluded that:

> "The contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions. There is no provision in the Convention authorizing the Court, under its contentious jurisdiction, to determine whether a law that has not yet affected the guaranteed rights and freedoms of specific individuals is in violation of the Convention. The Court finds that the promulgation of a law that manifestly violates the obligations assumed by a State upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the State in question."[147]

The suggestion in this passage that international responsibility arises, following a manifest violation of the treaty, only "if such violation affects the guaranteed rights and liberties of specific individuals" requires some explanation. Read literally, it suggests that there can be a violation of a treaty without any responsibility, which is not in accordance with the conception of State responsibility contained in the draft articles.[148] It seems however that the Court was distinguishing here between State responsibility for violation of the treaty per se and international responsibility under the Convention's procedures for direct violation of the rights of individuals, which alone falls within the Court's contentious jurisdiction.

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[145] ICCPR article 41 (1). The requirement is stated slightly differently in article 41 (1) (a): "is not giving effect to the provisions of the present Covenant". There is no requirement that the communication relate to any specified individual, but available local remedies must have been exhausted: article 41 (1) (c).

[146] *Inter-Am Ct HR (Ser. A)*, No. 12 (1991), at paras. 41–43.

[147] Ibid., paras. 49–50; also in (1995) 34 ILM 188, at pp. 1199–1201.

[148] Especially articles 3 and 16; see para. 11 above.

73. To summarize, this brief review shows a substantially common approach to the problem on the part of the various human rights bodies.[149] Legislation itself, provided that it is directly applicable to individuals or that its application is directly threatened, can constitute a breach of the convention concerned, although whether it does so in a given case requires an examination of the facts of that case. Subsequent processes within the State may provide reparation for such a breach, but they are not constitutive of it.[150]

74. A review of the field of diplomatic protection would also, it is believed, reach the same general conclusion. The point was succinctly made by the United Kingdom:

> "In general terms, the United Kingdom Government's view is that in a case where international law requires only that a certain result be achieved, the situation falls under draft article 21, paragraph 2. The duty to provide a fair and efficient system of justice is an example. Corruption in an inferior court would not violate that obligation if redress were speedily available in a higher court. In the case of such obligations, no breach occurs until the State has failed to take any of the opportunities available to it to produce the required result. If, on the other hand, international law requires that a certain course of conduct be followed, or that a certain result be achieved within a certain period of time, the violation of international law arises at the point where the State's conduct diverges from that required, or at the time when the period expires without the result having been achieved. Denial of a right of innocent passage, or a failure to provide compensation within a reasonable period of time after the expropriation of alien property, are instances of violations of such rules. Recourse to procedures in the State in order to seek 'correction' of the failure to fulfil the duty would in such cases be instances of the exhaustion of local remedies."[151]

75. Of course, there may be specific contexts in which the State does have a right to affect the rights of individuals provided compensation is payable. This is, in general, the case with expropriation of property for a public purpose, and the reason is precisely because in that context the right of eminent domain is recognized. But there is no right of eminent domain in relation to the arbitrary treatment of persons. There are also cases where the obligation is to have a *system* of a certain kind, e.g. the obligation to provide a fair and efficient system of justice. There, systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does

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[149] Under the African Charter on Human and People's Rights of 1981, there is provision both for communications from States and for other communications (articles 47, 55) to the Commission. There has so far been no public indication of the Commission's approach to the questions discussed here. Although similarities may be found in that respect in the context of European Union law (see, e.g., Case C-46/93, *Brasserie du Pêcheur SA v. Germany*, [1996] ECR I-1029, especially paras. 51 and 56), the specific character of EU law limits the value of the comparison. For a general approach to State liability under EC law see, e.g., P. Craig and G. de Búrca, *EU Law — Texts, Cases and Materials*, Oxford University Press, Oxford, 2nd ed., 1998, pp. 236–253.

[150] On the possibility that the enactment of a legislation may per se constitute a breach by a State of its obligations, provided it has a direct application on the individual, see, among others, C. F. Amerasinghe, *Local Remedies in International Law*, Grotius, Cambridge, 1990, pp. 209–210; A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge University Press, Cambridge, 1983, pp. 201–206; H. Dipla, *La responsabilité de l'Etat pour violation des droits de l'homme — Problèmes d'imputation*, Pedone, Paris, 1994, pp. 20–22. *Contra*, see P. Cahier, "Changements et continuité du droit international — Cours général de droit international public", *RCADI*, 1985-VI, vol. 195, pp. 261–263.

[151] A/CN.4/488, pp. 68–69.

not of itself amount to an unlawful act.[152] This is the example given by the United Kingdom in the passage quoted above. Systematic obligations have to be applied to the system as a whole. But many human rights obligations are not of this kind: for example, in cases of torture or arbitrary killing by State officials, the violation would be immediate and unqualified.[153]

76. It may be (as the United Kingdom notes) that the problem which has been analysed here is more one of the commentary to article 21 than of the text itself.[154] But the analysis suggests a number of conclusions.

The primacy of primary rules and of their interpretation

77. First, while it may be possible accurately to classify certain obligations as obligations of conduct or result, and while that may illuminate the content or application of the norms in question, such a classification is no substitute for the interpretation and application of the norms themselves, taking into account their context and their object and purpose. The problem with articles 20 and 21 is that they imply the need for an intermediate process of classification of obligations before questions of breach can be resolved. But in the final analysis, whether there has been a breach of an obligation depends on the precise terms of the obligation, and on the facts of the case. For example, it makes a difference that the obligations of States in the field of humanitarian law are expressly "to respect and ensure respect" for the relevant norms.[155] In other contexts, where different language is used, the position may be different. Taxonomy may assist in the interpretation and application of primary rules, but is no substitute for it.

78. This conclusion follows also from the analysis of the obligation of States in relation to torture, given by the International Tribunal for the Former Yugoslavia in a recent case. The Tribunal said:

> "Normally, the maintenance of passage of international legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (*lato sensu*) only when such legislation is concretely applied. By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture

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[152] Similarly, a temporary swamping of the system by litigation, causing unexpected delays, does not involve a breach "if the State takes appropriate remedial action with the requisite promptness": *Union Alimentaria Sanders, ECHR Series A*, No. 17 (1989), at p. 15 (para. 40).

[153] On further analysis it is probable that an obligation to provide a fair and efficient system of justice contains diverse elements, including certain obligations "of result" (e.g. the right to a judge) and others "of conduct". In short, it is a hybrid. Cf. Tomuschat, "What is a 'Breach' of the European Convention on Human Rights", at p. 328. Another clear example is the obligation of respect for family life: cf. the decision of the European Court of Human Rights as analysed in the *Marckx* case, *ECHR Series A*, vol. 31 (1979), and later decisions.

[154] The issue re-emerges, however, in the context of article 22 (exhaustion of local remedies): see paras. 138–146 below.

[155] See the *Nicaragua case (Merits)* (*I.C.J. Reports 1986*, p. 14, at p. 114 (para. 220)), referring to article 1 common to the four Geneva Conventions of 1949; cf. L. Condorelli and L. Boisson de Chazournes, "Quelques remarques à propos de l'obligation des États de 'respecter et faire respecter' le droit humanitaire en 'toutes circonstances'", in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honor of Jean Pictet* (Swinarski, ed.), Nijhoff, Dordrecht, 1984, pp. 17–35; N. Levrat, "Les conséquences de l'engagement pris par les Hautes Parties contractantes de 'faire respecter' les Conventions humanitaires", in *Mise en œuvre du droit international humanitaire*, Nijhoff, Dordrecht, 1989, pp. 263–296.

> is so great that it becomes imperative to preclude any national legislative act authorizing or condoning torture or at any rate capable of bringing about this effect."[156]

In other words, whether the enactment of inconsistent legislation constitutes of itself a breach of international law depends on the content and importance of the primary rule.

The diversity of primary rules

79. Secondly, it is difficult to overstate the immense variety of primary rules and the very different ways in which they are formulated. The means for achieving a result can be stated with many degrees of specificity. The ends to be achieved may, depending on the circumstances, dictate the necessary means with precision. Means and ends can be combined in various ways.[157] For example, take the common case of a "best efforts" obligation to achieve a particular result. This is quite precisely not an obligation of result, but rather, depending on its formulation, an obligation to take such steps as are reasonably required and available to the State concerned with a view to achieving the result specified. Provided the State takes some action to that end, not obviously inadequate or inappropriate, no issue of breach may arise. But if it becomes clear that the result is likely not to be achieved, and that there are further steps open to the State which would achieve it, then the incidence of the obligation in those circumstances may become more rigorous, and even tend towards an obligation of result.[158] Thus in practice, obligations of conduct and obligations of result present not a dichotomy but a spectrum.[159]

The particularity of the distinction between obligations of conduct and result

80. Thirdly, not all obligations can be classified as either obligations of conduct or of result. There can be hybrids, for example, and the draft articles themselves distinguish a further "type", obligations of prevention. Before reaching any conclusions on articles 20 and 21, it is useful to look at such obligations.

(f) Article 23: Breach of an international obligation to prevent a given event

81. Article 23 provides as follows:

> "When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

82. Article 23 continues the analysis of the different kinds of obligations (obligations of conduct/obligations of result) covered by articles 20 and 21. The commentary deals with obligations of prevention in the following way:

> "The characteristic feature ... is precisely the notion of an event, i.e. an act of man or of nature which, as such, involves no action by the State ... [I]f the result which the obligation requires the State to ensure is that one or another event should not take place, the key indication of breach of the obligation is the occurrence of the event,

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[156] International Tribunal for the Former Yugoslavia (Judges Mumba, Cassese, May), *Prosecutor v. Anto Furundzija*, judgement of 10 December 1998, para. 150; see also ibid., para. 149.

[157] A point made by G. Lysén, *State Responsibility and International Liability of States for Lawful Acts. A Discussion of Principles* (1997) pp. 62–63.

[158] See para. 86 below.

[159] As pointed out in a number of Government comments: see para. 56 above.

> just as the non-occurrence of the event is the key indication of fulfilment of the obligation ... [T]he non-occurrence of the event is the result that the State is required to ensure, and it is the occurrence of the event that determines that the result has not been achieved."[160]

83. The commentary goes on to assert that in the cases of obligations of prevention, the mere failure to prevent is not a sufficient condition for responsibility, although it is a necessary one: "The State can obviously be required only to act in such a way that the possibility of the event is obstructed, i.e. to frustrate the occurrence of the event as far as lies within its power."[161] Thus, obligations of prevention are inherently obligations to take all reasonable or necessary measures to ensure that the event does not occur. They are not warranties or guarantees that an event will not occur.[162]

Government comments on article 23

84. France remarks that "the somewhat obscurely worded article 23 ... relates to rules of substantive law, which classify primary obligations. It thus has no place in a draft of this kind".[163] Germany agrees.[164] The United Kingdom regards article 23 as uncontroversial but also unnecessary; in its view it can be deleted or combined with article 21.[165]

The content of obligations of prevention

85. It is tempting to analyse obligations of prevention as "negative" obligations of result. For such obligations, the result in question is not the occurrence of something but its non-occurrence. On the other hand, whether this is so depends on the interpretation of the particular primary rule. The commentary[166] gives as an example of an obligation of prevention, article 22 (2) of the Vienna Convention on Diplomatic Relations, which provides that:

> "The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."

According to the commentary, this is an obligation "whose breach similarly takes place only if that result [i.e. intrusion, damage or disturbance] can be seen not to have been ensured".[167]

86. Although there are obligations of prevention in the sense explained in the commentary, it is clear that article 22 (2) of the 1961 Convention is not such an obligation. If anything, it is an obligation of conduct. No doubt it does not involve a warranty or guarantee against intrusion; but it is a continuing obligation on the host State to take all appropriate steps to protect the mission, which becomes more demanding if for any reason the mission is invaded

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[160] Commentary to article 21, para. (35).

[161] Commentary to article 23, para. (6).

[162] On the other hand, neither are they "obligations of due diligence" in the ordinary sense. Such an obligation would be breached by a failure to exercise due diligence, even if the apprehended result did not occur: Commentary to article 23, para. (4), note 6.

[163] Ibid.

[164] Ibid., p. 67.

[165] Ibid., p. 72.

[166] Commentary to article 23, paras. (4), (12), note 19. See also the comments by Denmark (on behalf of the Nordic countries), cited above, para. 56.

[167] Ibid., para. (12). According to the commentary, diplomatic protests made at an earlier time are concerned with securing performance of the obligation and do not raise issues of responsibility: ibid.

or disturbed. In the *Case concerning United States Diplomatic and Consular Staff in Tehran*, the International Court referred to these and other provisions of the Convention as imposing on the receiving State "the most categorical obligations ... to take appropriate steps to ensure the protection of" the United States missions and their personnel.[168] It went on to hold that, through its inaction in the face of various threats from the militants:

> "the Iranian Government failed altogether to take any 'appropriate steps' to protect the premises, staff and archives of the United States mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion ... [I]n the opinion of the Court ... the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means ... This inaction of the Iranian Government by itself constituted clear and serious violation of Iran's obligations to the United States under the provisions of article 22, paragraph 2 ..."[169]

Moreover, the interpretation of article 22 (2) favoured in the commentary is an undesirable one in principle; States should not be able to neglect that "special duty" on the basis that intrusion, damage or disturbance has not yet occurred and may never occur.

87. A better example of an obligation of prevention, also mentioned in the commentary,[170] is the principle enunciated in the *Trail Smelter* arbitration, that a State should use its best efforts to prevent cross-border damage by pollution to a neighbouring State. The commentary goes on to assert that, "[e]ven in the specific case of an obligation to prevent an event, the presence of damage is not an additional condition for the existence of an internationally wrongful act".[171] This is true if the situation which has to be prevented is not defined in terms of the occurrence of damage, but it *may* be so defined. States can assume obligations to prevent damage to particular persons or to the territory of other States, and it may be that on the proper interpretation of the particular obligation it is the occurrence of the damage which triggers responsibility, rather than the failure to take steps to prevent it.

Conclusions on articles 20, 21 and 23

88. For the reasons given above,[172] the Special Rapporteur believes that article 21 (2) is an over-elaboration and a possible source of misunderstanding, and that it should be deleted. The essential difficulty lies in the notion of an obligation of result which, notwithstanding a *prima facie* breach, nonetheless "allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State". No doubt primary rules can take manifold forms, and a primary rule might allow a State to rescue itself from a breach by remedial action which would have the effect not merely of providing reparation but of cancelling out the earlier breach entirely. But this is unusual.[173] If the breach of an obligation is merely

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[168] *I.C.J. Reports 1980*, p. 3 at p. 30 (para. 61).

[169] Ibid., at pp. 31–32 (paras. 63, 67). The Court concluded that the Iranian conduct "clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises" (ibid., at pp. 35–36 (para. 76)). See also S. Rosenne, *Breach of Treaty*, pp. 50, 67. This point was also made by Germany in its comments: A/CN.4/488, p. 67.

[170] Commentary to article 23, para. (11). For the decision see (1938 and 1941) 3 UNRIAA 1905.

[171] Commentary to article 23, para. (5).

[172] See paras. 69–75 above.

[173] More usually, an obligation may specify alternative modes of compliance (e.g. the *aut dedere aut judicare* obligation in extradition law), in which case, even if one mode is precluded, the other remains. But human rights obligations do not take this form.

threatened, preventive or remedial action may be called for, but the breach will by definition not yet have occurred. If it has occurred, subsequent conduct may mitigate its effects, or may (by providing an effective local remedy) eliminate the underlying grievance. But it is misleading in the latter case to suggest that there was never a breach.

89. Turning to the basic distinctions between obligations of conduct, result and prevention, as set out in articles 20, 21 (1) and 23, there is clearly a strong case for simply deleting them. They have been criticized by a number of Governments as over-refined.[174] They have been widely criticized in the literature.[175] Their relationship to similar concepts under national law is obscure and even contradictory.[176]

90. Moreover, whatever their analytical value, the distinctions appear to relate to the content and meaning of the primary rules, and this may explain why, in a statement of secondary rules, they appear to be circular. For example, article 20 appears to say nothing more than that, when a State has assumed an obligation to engage in certain conduct, the obligation is breached if the State does not engage in that conduct. The position with respect to obligations of conduct and prevention may be different, because of the hidden significance of the phrase "by the conduct adopted" in articles 21 (1) and 23. As the commentary explains, this is intended to convey the idea that in the normal case of an obligation of prevention, two conditions are required for responsibility: the failure of the State to take all available steps to prevent the event in question occurring, and the occurrence of that event in circumstances such that, if the State had taken steps available to it, the event would not (or might well not) have occurred.[177] But even here there is a difficulty, in that, while this may be the natural interpretation of an obligation of prevention, it is not the only possible interpretation. A State could, after all, give an undertaking that a certain result will not occur, save in situations of *force majeure*. Or it could give an unconditional guarantee; in other words, it could take the risk even of unforeseen events amounting to *force majeure*. The meaning of any particular obligation depends on the interpretation of the relevant primary rule, but this process of interpretation falls outside the scope of the draft articles. In other words, either articles 21 (1) and 23 are likewise circular ("for primary rules of a certain content, this is their content"), or they create a presumption of the interpretation of certain primary rules, which is not the function of the draft articles.

91. The case for deletion is a formidable one, but still there must be a hesitation, given the currency of the terms used,[178] their value in some cases, e.g. in determining when a breach has occurred, and the relative poverty of the conceptual framework of international law in matters relating to breach of obligation. Entities ought not to be unnecessarily multiplied, but there is something to be said for retaining existing concepts, even if those concepts are not comprehensive in their coverage. The task of explaining the concepts employed to describe international obligations has its own value; the commentaries to articles 20, 21 and, especially, 23 are useful, although they are in need of modification to accommodate the points made above.

92. The Commission is invited to express its view on whether to retain the distinction in the text of Chapter III. To provide a focus for its debate, the Special Rapporteur proposes

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[174] See paras. 56 and 84 above.

[175] See para. 59 above.

[176] See paras. 57–58 above.

[177] Commentary to article 23, para. (6).

[178] Not always in a very enlightening way: cf. *Case concerning the Gabčikovo-Nagymaros Project, I.C.J. Reports 1997*, p. 7, at p. 77 (para. 125), where the Court referred to the parties having accepted "obligations of conduct, obligations of performance, and obligations of result".

a single article embodying the substance of the distinction.[179] To express his own scepticism, however, the Special Rapporteur has placed the article in square brackets.

(g) Articles 18 (3) to (5) and 24 to 26: Completed and continuing wrongful acts

93. The final three articles in Chapter III deal with different aspects of the problem of wrongful acts continuing in time (referred to as the "Moment and duration of the breach of an international obligation"). They provide as follows:

> "*Article 24*
>
> "*Moment and duration of the breach of an international obligation by an act of the State not extending in time*
>
> "The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.
>
> "*Article 25*
>
> "*Moment and duration of the breach of an international obligation by an act of the State extending in time*
>
> "1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.
>
> "2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.
>
> "3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.
>
> "*Article 26*
>
> "*Moment and duration of the breach of an international obligation to prevent a given event*
>
> "The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues."

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[179] For the purposes of determining whether there has been a breach (as distinct from the duration of a breach), it seems sufficient to treat obligations of prevention in the same way as obligations of result. Whether the duration in time of breaches of obligations of prevention requires separate treatment is dealt with below: see paras. 132–134.

As noted above, it is useful to consider in the same context the detailed provisions of article 18 (3) to (5), which employs the same distinctions between continuing, composite and complex wrongful acts.[180]

94. The commentary to these articles begins by noting that temporal questions apply both to "the determination of the moment when the existence of the breach of an international obligation is established and [to] the determination of the duration, or the continuance in time, of the breach".[181] It notes the various consequences that can flow from such determinations, e.g. for the jurisdiction of tribunals, the nationality of claims or the application of the doctrine of extinctive prescription, stressing at the same time that these determinations have to be made by reference to legal rules and not only by reference to the facts.[182] In the case of "instantaneous acts" (e.g. the shooting down of a civilian airliner), their effects may last for a long time and may be relevant in judging the seriousness of the act. But the continuation of those effects has "no bearing on the duration of the State act that caused them — an act that will in any event remain an act that does not extend in time".[183] For example, the commentary asserts that the decision of the Permanent Court in *Phosphates in Morocco* treated the relevant French decisions as instantaneous and not involving a continuing wrongful act.[184]

95. As to the notion of a wrongful act extending in time, which is dealt with in article 25, the commentary introduces the distinction between continuing, composite and complex acts. A "continuing act" is one which "proceeds unchanged over a given period of time: in other words, an act which, after its occurrence, continues to exist as such and not merely in its effects and consequences".[185] The commentary notes that the notion of continuing wrongful acts (which is common to many national legal systems) owes its origins in international law to Triepel, and has frequently been applied by courts, especially the European Court.[186]

96. A "composite act"is defined as "an act of the State composed of a series of individuals acts of the State committed in connection with different matters".[187] According to the commentary, they "comprise a sequence of acts which, taken separately, may be lawful or unlawful, but which are interrelated by having the same intention, content and effects, although relating to different specific cases". Examples include a series of administrative decisions adversely affecting nationals of a particular State which establishes a pattern of discrimination, or a refusal to allow those nationals to participate in economic activity, contrary to an international obligation of the host State. Collectively such acts might be unlawful, whether or not the individual decisions are.[188] Some primary rules in terms require the repetition of conduct, e.g. systematic breaches of human rights. In such cases, the first act in the series does not suffice to establish that a wrongful act has been committed, but if it is followed by other similar acts, the wrongful conduct constituted by the series of acts will be regarded as commencing with the first.[189]

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[180] For the text of article 18 see para. 35 above.

[181] Commentary to article 24, para. (1).

[182] Ibid., para. (5).

[183] Ibid., para. (7).

[184] Ibid., para. (10); see also commentary to article 25, para. (5). For reasons explained below the Special Rapporteur does not agree with this view of the decision: see para. 146.

[185] Commentary to article 25, para. (2).

[186] Ibid., paras. (4)–(7).

[187] Ibid., para. (1).

[188] Ibid., paras. (10)–(11).

[189] Ibid., para. (12).

97. Finally there is the concept of a "complex" act, which is defined as "an act of the State made up of a succession of actions or omissions in connection with one and the same matter".[190] A classic example is denial of justice to an alien. This is a complex act because it is not established by a single decision of an administrator or a lower court: "the 'complex' internationally wrongful act is the collective outcome of all the actions or omissions by State organs at successive stages in a given case, each of which actions or omissions could have ensured the internationally required result but failed to do so".[191] This likewise has consequences in terms of the duration of the wrongful act. In the case of a complex act, "[t]he time of commission of the breach must therefore be reckoned from the moment of occurrence of the first State action that created a situation not in conformity with the result required by the obligation, until the moment of the conduct that made that result definitively unattainable".[192] In such a case, the breach is not established until the last act in the series, but the breach occurs from the beginning of the series, and thus has a certain retrospective effect.

98. This sequence of articles is concluded by article 26, dealing with the moment and duration of the breach of obligations of prevention. The commentary stresses the parallelism between article 26 and article 23. Since in the case of obligations of prevention the occurrence of the outcome in question is a necessary condition of breach, it follows that its occurrence "must also be the decisive factor for the determination of the moment and duration of the breach in that same case".[193] The idea that even a manifest and irreversible failure by the State to prevent the event occurring could itself amount to a breach is rejected. The breach cannot occur before the event itself occurs: "logic therefore precludes the idea that the moment of the breach could be any moment preceding the occurrence of the event".[194] But the position after the prohibited event has occurred is different. If the event has a continuing character, then "it is logical to consider that the obligation to prevent [its] occurrence ... entails the obligation to ensure that it is terminated".[195] Hence in the case of continuing events, the obligation of preventing them is itself a continuing obligation, and its breach extends for as long as the event continues.[196]

Government comments on articles 18 (3) to (5) and 24 to 26

99. Those Governments which have commented on these articles are somewhat divided. France favours the retention of the various classifications of breaches made in article 25 on the ground that they establish a useful "classification of breaches on the basis of how the breach is committed", but suggests that a linkage be made to the equivalent paragraphs of article 18.[197] The United Kingdom, by contrast is:

> "concerned that the draft articles have moved too far in the direction of drawing fine distinctions between different categories of conduct. It hopes that the Commission will consider how far it is necessary, and how far it is helpful, to adopt articles defining with great analytical precision different categories of wrongful conduct. It

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[190] Ibid., para. (1).

[191] Ibid., para. (16).

[192] Ibid., para. (17). The commentary relies heavily on the Italian argument in the case concerning *Phosphates in Morocco* (as to which see below, paragraph 146): commentary to article 25, para. (18).

[193] Commentary to article 26, para. (1). For discussion of article 23 see above, paragraphs 85–87.

[194] Ibid., para. (2).

[195] Ibid., para. (6).

[196] Ibid., para. (7).

[197] A/CN.4/488, p.73.

> may be preferable to have a simpler conception of wrongful conduct, and leave its application in concrete instances to be worked out in State practice."[198]

Along similar lines, the United States criticizes article 18 and articles 24 to 26 for establishing:

> "a complex series of abstract rules governing the characterization of an act of a State as a continuing, composite or complex act ... Read together, however, these draft articles inject far more complexity into the draft than necessary and provide possible legal hooks for wrongdoing States to evade their obligations. These provisions may serve to complicate rather than clarify determinations of responsibility."[199]

Germany makes an identical comment in relation to articles 24 to 26.[200] Greece suggests that these provisions "should be worded more simply and more clearly".[201]

Overview of the issues raised

100. The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently in practice and is the subject of a considerable jurisprudence.[202] The issue in such cases is often not one of responsibility per se so much as the jurisdiction of a court or other body, or the admissibility of an application.[203] But there are also potential consequences in the field of responsibility proper, and indeed one very important consequence, relating to cessation of wrongful acts, is dealt with in article 41 of the draft articles. The existing provisions may be complex, but it seems that at least some provision dealing with these subjects is called for.

101. It is proposed first to consider the question of when an internationally wrongful act may be said to have occurred. Even if that act is of a continuing character, there must be a point in time at which the wrongful act already exists. Secondly, there is the question of the distinction between completed acts (acts not extending in time) and continuing acts. Thirdly, there is the question of accommodating, within the basic framework established by those distinctions, the further refinements introduced by the notions of composite and complex wrongful acts. In each context it is necessary to consider how the principle of the intertemporal law affects responsibility in the case of continuing, composite and complex acts. Thus article 18 (3) to (5) will be considered as part of this review.

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[198] Ibid., pp. 47–48. See also para. 56 above.

[199] Ibid., p. 48, citing I Brownlie, *State Responsibility*, pp. 197–198.

[200] Ibid., p. 73.

[201] A/CN.4/492, p. 10. See also the general remarks of Governments on chapter III, summarized in para. 4 above.

[202] See, for example, *Mavrommatis Palestine Concessions, P.C.I.J., Series A*, No. 2, p. 35; *Phosphates in Morocco (Preliminary Objections), P.C.I.J., Series A/B*, No. 74, pp. 23–29; *Electricity Company of Sofia and Bulgaria (Preliminary Objection), P.C.I.J., Series A/B*, No. 77, pp. 80–82; *Case Concerning Right of Passage over Indian Territory (Merits), I.C.J. Reports 1960*, pp. 33–36. The issue has often been raised before the organs of the European Convention on Human Rights (cf. J. Pauwelyn, "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems", *BYIL*, vol. 66, 1995, pp. 430-440)): see, e. g., the decision of the Commission in the *De Becker Case* (*Yearbook of the ECHR*, 2 (1958-1959), p. 214, at pp. 234 and 244); judgments of the Court in the *Ireland* v. *United Kingdom Case*, 18 January 1978, Series A, No. 25, p. 64; the *Papamichalopoulos and Others* v. *Greece Case*, 24 June 1993, Series A, No. 260–B, para. 40; the *Agrotexim and Others* v. *Greece Case*, 24 October 1995, Series A, No. 330–A, para. 58.

[203] See, *inter alia*, J. Pauwelyn, "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems", *BYIL*, vol. 66, 1995, 415–450; J. Salmon, "Le fait étatique complexe : une notion contestable", *AFDI*, vol. XXVIII, 1982, 709-738; E. Wyler, "Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite", *RGDIP*, vol. 95, 1991, pp. 881–914.

When does a breach of obligation begin? Distinguishing apprehended, imminent or "anticipatory" breaches from existing breaches

102. An initial question, common to all three articles, is when a breach of international law exists (as distinct from being merely apprehended or imminent). In other words, when does the wrongful act "occur" in the first place? In principle that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,[204] incitement or attempt,[205] in which case the threat, incitement or attempt is itself a wrongful act. Whether there are general secondary rules of international law in relation to such "ancillary" wrongful acts as incitement, complicity and such matters will be considered further in the context of Chapter IV of Part One of the draft articles. For present purposes, the question is when a wrongful act, defined by reference to the primary rule, can be said to have occurred.

103. That was an issue in the *Case concerning the Gabčikovo-Nagymaros Project.*[206] Following Hungary's refusal to continue with the project, as provided for in a bilateral Treaty of 1977, Czechoslovakia began actively planning for, and subsequently building, a unilateral substitute scheme (the so-called "Variant C"), using installations jointly constructed for the original project and some additional elements constructed on Czechoslovak territory. Variant C was actually implemented when the Danube was diverted by means of the new installations, in October 1992. The Court held that Variant C was unlawful for various reasons, notwithstanding the prior Hungarian breach of the 1977 Treaty. But the question was, at what point had the Czechoslovak breach occurred? This mattered, *inter alia*, because in May 1992 Hungary had purported to terminate the Treaty, relying on Czechoslovakia's insistence on the construction of Variant C. Hungary pointed out that article 60 of the Vienna Convention on the Law of Treaties does not preclude a party which is itself in breach of a treaty from terminating on the ground of the other party's breach, and it argued that, at least by April 1992, Czechoslovakia's determination to proceed with the illegal diversion of the Danube amounted to an existing breach, or alternatively a repudiation of the Treaty, entitling Hungary to terminate it.[207]

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[204] Notably, Article 2, paragraph 4, of the Charter of the United Nations prohibits the "threat or use of force against the territorial integrity or political independence of any State". For the question of what constitutes a threat of force, see *Legality of the Threat or Use of Nuclear Weapons I.C.J. Reports 1996*, p. 222, at pp. 246–247 (paras. 47–48); cf. R. Sadurska, "Threats of Force", *AJIL*, vol. 82, 1988, pp. 239–268.

[205] A particularly comprehensive formulation is that of article III of the Genocide Convention of 1948, which prohibits, in addition to actual genocide, conspiracy, direct and public incitement, attempt and complicity. Article III is of course primarily directed at individual criminal responsibility, but in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Preliminary Objections)*, the International Court noted that "the reference in article IX to the responsibility of a State for genocide or for any of the other acts enumerated in article III does not exclude any form of State responsibility": *I.C.J. Reports 1996*, p. 595, at p. 616 (para. 32). This implies that States may be directly responsible themselves for incitement, conspiracy, complicity and attempt.

[206] *I.C.J. Reports 1997*, p. 7.

[207] In some legal systems, the notion of "anticipatory breach" is used to deal with the definitive refusal by a party to perform a contractual obligation, in advance of the time laid down for its performance. Confronted with an anticipatory breach, the party concerned is entitled to terminate the contract and sue for damages. See *Frost v. Knight* (1872) LR 7 Ex 111; *White and Carter (Councils) Ltd v. McGregor* [1962] AC 413; K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (2nd edn, trans. Weir, 1987), pp. 543–4. Other systems achieve similar results without using this concept, for example by construing a refusal to perform in advance of the time for performance as a "positive breach of contract": ibid., p. 531 (German law). There appears to be no equivalent in international law, but article 60 (3) (a) of the Vienna Convention on the Law of Treaties defines a material breach as including

104. The Court rejected this argument, holding (by a majority of 9 to 6) that the breach had not occurred until the actual diversion of the Danube in October. It noted:

> "that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied. Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which 'does not qualify as a wrongful act' ..."[208]

Accordingly the Court held that "Czechoslovakia was entitled to proceed, in November 1991, to Variant C insofar as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992".[209] But since Hungary had purported to terminate the Treaty in May 1992, before it had been breached by Czechoslovakia and before Hungary had suffered any loss as a result of Czechoslovakia's conduct, the purported termination was "premature" and ineffective.[210]

105. In any event, according to the Court, Hungary had prejudiced its right to rely on Czechoslovakia's breach, since it was itself responsible for an earlier and related breach of the same Treaty.[211] This aspect of the case involves the so-called *exceptio inadimpleti contractus*, and will be dealt with in the context of Chapter V of Part One.

106. Thus the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Such conduct does not itself amount to a breach if it does not "predetermine the final decision to be taken". But whether that is so in any given case will depend on the precise facts and on the content of the primary rule. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula. The term "occurs" used in draft articles 24 to 26 seems as good as any for this purpose.

When does a breach of obligation continue? The distinction between continuing and completed wrongful acts

107. The second question relates to the distinction between wrongful acts extending in time and those not so extending. On closer analysis, there may be two separate distinctions here. The first is the distinction between wrongful acts which occur, and are completed, at a particular moment in time, and those which take some period of time to perform. The secon is the distinction between wrongful acts which have been completed (even though their effects may continue) and wrongful acts which are of a continuing character. The draft articles, especially articles 24 and 25, seem to telescope the two ideas.

"a repudiation ... not sanctioned by the present Convention", and it is clear that such a repudiation could occur in advance of the time for performance.

[208] *I.C.J Reports 1997*, p. 7, at p. 54 (para. 79), citing the commentary to draft article 41. On this point six judges (President Schwebel; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek) dissented.

[209] Ibid., p. 57 (para. 88).

[210] Ibid., pp. 66–67 (paras. 108–109).

[211] Ibid., p. 67 (para. 110).

108. It is no doubt possible for a wrongful act to be committed in an instant, the instant at which property is confiscated by operation of law, for example, or legislation comes into force. This is the lawyer's *punctum temporis* at which property is transferred from one person to another, or some other "act in law" is performed. In the contemplation of the law such acts may be instantaneous, but it is rare for acts not to extend at least for some period of time. It is, however, not clear that the distinction between an act that occurs in an instant of time and one that (even if it took 5 seconds, 5 minutes or 5 hours) is now complete, is ever likely to matter for the purposes of State responsibility. For practical purposes the distinction between completed and continuing wrongful acts seems more important. But that distinction is a relative one: a continuing wrongful act is one that has not been completed *yet*, i.e. at the relevant time.

109. This is not intended to diminish the importance of the distinction between continuing and completed wrongful acts, but rather to place it in its proper context. That the distinction is important and has legal consequences can be seen from the following non-exhaustive review:

(a) The *Rainbow Warrior Arbitration* involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand for the settlement of the *Rainbow Warrior* incident. The Arbitral Tribunal referred with approval to articles 24 and 25 (1) of the draft articles and to the distinction between instantaneous and continuing wrongful acts,[212] and said:

> "Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach. And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features."[213]

Indeed the Tribunal went on to draw further legal consequences from the distinction, in terms of the duration of French obligations under the agreement:

> "The characterization of the breach as one extending or continuing in time, in accordance with article 25 of the draft on State Responsibility, ... confirms the previous conclusion concerning the duration of the relevant obligations by France under the First Agreement ... France committed a continuous breach of its obligations, without any interruption or suspension, during the whole period when the two agents remained in Paris in breach of the Agreement. If the breach was a continuous one ... that means that the violated obligation also had to be running continuously and without interruption. The 'time of commission of the breach' constituted an uninterrupted period, which was not and could not be intermittent ... Since it had begun on 22 July 1986, it has to end on 22 July 1989, at the expiry of the three years stipulated. Thus, while France continues to be liable for the breaches which occurred before 22 July 1989, it cannot be said today that France is *now* in breach of its international obligations."[214]

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[212] (1990) 20 UNRIAA 217, at p. 264 (para. 101).

[213] Ibid.

[214] Ibid., at pp. 265–266 (emphasis in original). But see the dissenting opinion of Sir Kenneth Keith, ibid., pp. 279–284.

(b) The notion of continuing wrongful acts has also been applied by the European Court of Human Rights to establish its jurisdiction *ratione temporis* in a series of cases (as noted in the commentary). The issue arises because the Court's jurisdiction may be limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. Thus in *Papamichalopoulos v. Greece*, a seizure of property not involving formal expropriation occurred some eight years before Greece recognized the Court's competence. The Court held that there was a continuing breach of the right to peaceful enjoyment of property under article 1 of Protocol 1, and therefore upheld its jurisdiction over the claim.[215]

(c) In *Loizidou v. Turkey*, similar reasoning was applied by the Court to the consequences of the Turkish invasion of Cyprus in 1974, as a result of which the applicant was denied access to her property in northern Cyprus. Turkey relied on the fact that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus of 1985, the property in question had been expropriated, and this had occurred prior to Turkey's acceptance of the Court's jurisdiction in 1990. The Court held that, in accordance with international law and having regard to the relevant Security Council resolutions, it could not attribute legal effect to the 1985 Constitution of the TNRC, so that the expropriation was not completed at that time and the property continued to belong to the Applicant. The conduct of the TNRC and of Turkish troops in denying the applicant access to her property continued after Turkey's acceptance of the Court's jurisdiction, and constituted a breach of article 1 of Protocol 1.[216] But Judge Bernhardt, in a dissenting opinion shared in substance with some other members of the Court, took a different approach to the distinction between completed and continuing breach. He said:

> "The Convention organs have accepted the notion of 'continuing violations' ... I entirely agree with this concept, but its field of application and its limits must be appreciated. If a person is kept in prison before and after the critical date [t]he essential fact ... is the actual behaviour of State organs which is incompatible with the commitments under the European Convention ... The factual and legal situation is ... different when certain historical events have given rise to a situation such as the closing of a borderline with automatic consequences for a great number of cases. In the present case, the decisive events date back to the year 1974. Since that time, Mrs. Loizidou has not been able to visit her property in northern Cyprus. This situation continued to exist before and after the adoption of the Constitution of the so-called 'Turkish Republic of Northern Cyprus' ... Turkey has recognized the jurisdiction of the Court only 'in respect of facts ... which have occurred subsequent to the date of deposit of the present declaration'; the closing of the borderline in 1974 is in my view the material fact and the ensuing situation up to the present time should not be brought under the notion of 'continuing violation'."[217]

(d) The Human Rights Committee has also endorsed the idea of continuing wrongful acts. For example, in *Lovelace v. Canada*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a band member, although the loss had occurred at the time of her marriage in 1970, and Canada only accepted the Committee's jurisdiction in 1976. The Committee noted that it was:

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[215] *ECHR, Series A*, No. 260B (1993).

[216] ECHR, judgement of 18 December 1996, paras. 41–47, 63–64 (1996). See also *Loizidou v. Turkey (Preliminary Objections)* (1995), Series A, No. 310, at pp. 33–34 (paras. 102–105).

[217] ECHR, judgement of 18 December 1996, para. 2. Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölcüklü in substance agreed.

> "not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol ... In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status ... at the time of her marriage in 1970 ... The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date."[218]

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, were sufficient to constitute a breach of article 27 of the Covenant after that date. Here the notion of a continuing breach was relevant not only to the Committee's jurisdiction but also to the selection of article 27 as the most directly relevant provision of the Covenant so far as the applicant was concerned.

(e) In the *Case concerning the Gabčíkovo-Nagymaros Project*,[219] both Hungary's refusal to continue with the project and Czechoslovakia's implementation and operation of Variant C were continuing wrongful acts, and this had consequences in various ways. For example, when Variant C was put into operation, it did so in the context of a continuing wrongful act by Hungary, and this had various consequences in terms of the survival of the 1977 Treaty.[220] When Slovakia came into existence on 1 January 1993, it was confronted with the continuing wrongful conduct of both parties to the Treaty: the situation was accordingly different from that which might have applied had Slovakia been, as it were, the accidental inheritor of the consequences or effects of unlawful acts committed and completed earlier.[221]

110. As these cases show, conduct having commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including purposes within the realm of State responsibility. For example, the obligation of cessation contained in article 41 applies only to continuing wrongful acts. This is a sufficient basis to include the distinction between completed and continuing wrongful acts as an element of Chapter III.

111. It may, however, be objected that the notion of a continuing wrongful act cannot be defined, or can only be defined in relation to the relevant primary rule. Certainly, no attempt at a definition is made in article 25, which refers only to "an act of the State having a continuing character". Both the primary rule and the circumstances of the given case will be relevant in deciding whether a wrongful act has a continuing character, and, again, it is probably the case that a detailed definition cannot be offered in the abstract. On the other hand, guidance can be offered in the commentary, and the difficulty of applying a valid distinction in particular cases is no reason to abandon the distinction.

112. This being so, it is not necessary for the Commission to take a position on the substantive issues which gave rise to a division of opinion in some of the cases outlined

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[218] Communication No. R 6/24, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40) (1981), p. 166, paras. 10–11.

[219] *I.C.J Reports*, 1997, p. 7.

[220] See paras. 103–108 above.

[221] See para. 104 above.

above.[222] For example, in the *Rainbow Warrior* case, the Tribunal relied on article 25 (1) as a basis for holding that France's obligation to detain the two officers on the island of Hao had terminated in 1989. Normally, an obligation to do something by a certain date would be interpreted as involving two distinct obligations — to do the thing, and to do it timely — with the result that the failure to do the thing by a certain day (whether or not that failure is excusable) does not terminate the obligation. On the contrary, the State concerned would normally be in continuing breach of the main obligation after the due date for its performance.[223] It is true that, as France argued in that case, "there is no rule of international law extending the length of an obligation by reason of its breach".[224] But this is because the question is one of the interpretation of the relevant primary rule. One would not normally regard an obligation to maintain a situation for a specified period as "completed" if it had been breached for the whole of that period. But whatever the better interpretation of the primary rule may be, the secondary rules of State responsibility have nothing to say on the question.[225]

113. To summarize, in the Special Rapporteur's view, the importance of the concept of continuing wrongful acts clearly justifies the retention of provisions along the lines of articles 24 and 25 (1). Given that they relate to a single operative distinction, those provisions could perhaps be combined in a single article.[226]

The intertemporal principle in relation to continuing wrongful acts: Article 18 (3) in relation to 25 (1)

114. It remains to consider how the intertemporal principle applies to acts of a continuing character. According to article 18 (3), an act of a continuing character is only breached "in respect of the period during which the act continues while the obligation is in force for that State". This is plainly correct as to the aftermath of a continuing act. If the obligation ceases to exist, there can be no question of any new or continuing breach thereafter.[227] Thus in the *Rainbow Warrior Arbitration*, the disagreement related to the question whether the

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[222] Nor is it necessary for the Commission to take a categorical position on a question on which two previous special rapporteurs have disagreed, viz, whether expropriation is a completed or continuing wrongful act. See Arangio-Ruiz, Preliminary Report, *Yearbook ... 1988*, vol. II, Part One, p. 14, with references to earlier ILC work. To some extent that too depends on the content of the primary norm said to have been violated, and it certainly depends on the facts. In the view of the present Special Rapporteur, where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred under the *lex loci* and the property is actually taken, the expropriation itself will then be a completed act. The position with a de facto, "creeping" or disguised occupation, however, may well be different: cf. *Papamichalopoulos v. Greece*, discussed above, para. 109. Exceptionally (as in *Loizidou v. Turkey*, above, para. 109), a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act. The example shows the complexity of individual cases, and the unwisdom of attempting to define such issues of interpretation and application in detail in the draft articles.

[223] The position might be different if the conduct required was of no value to the obligee after the due date: e.g. an obligation to inform another State of the intention to do something, prior to doing it.

[224] (1990) 20 UNRIAA 217, at p. 266.

[225] In the *Case concerning the Gabčikovo-Nagymaros Project, I.C.J Reports 1997*, p. 7, Hungary did not argue (and plainly could not have done so) that its obligation to construct installations had lapsed because the time for doing so had passed. The impact of circumstances precluding wrongfulness on the time for performance of the obligation is discussed under Chapter V.

[226] For the text proposed, see para. 156 below.

[227] On the other hand, questions of restitution can still arise, and the distinction between cessation and restitution is not always easy to draw. The matter is considered in the context of article 41.

obligation had expired after the three-year period, not as to the legal consequences if it had expired.[228]

115. The position in respect of periods prior to the entry into force of the obligation is also clear. In accordance with the principle stated in article 18 (1), the conduct of a State is internationally wrongful only if the rule in question was in force for that State at the time of the conduct.[229] In the several cases discussed above, either the rule in question was not in force for the State at the time the wrongful conduct commenced, or the court had no jurisdiction over the State in respect of that time, and was therefore in no position to decide on its responsibility then. Article 25 (1), however, fails to refer to this case. It provides that a continuing breach "occurs at the moment when the act begins", which is not true if the rule in question was not then in force.[230] Article 25 (1) needs to be qualified accordingly, and the point can be further explained in the commentary. If this is done, it seems that the language of article 25 (1) ("and remains not in conformity with the international obligation") is adequate to deal with the intertemporal problem for continuing wrongful acts, in which case article 18 (3) can be deleted as unnecessary.

The distinction between composite and complex acts: Article 18 (4) and (5); article 25 (2) and (3)

116. Whether the further distinction in article 25, paragraphs (2) and (3), between composite and complex acts (and the related provisions of article 18, paragraphs (4) and (5), dealing with intertemporal issues) needs to be retained is another question. As discussed above, a composite act is defined as "an act of the State, composed of a series of actions or omissions in respect of separate cases". It is contrasted with a "complex act", which is "a succession of actions or omissions by the same or different organs of the State in respect of the same case". An example of a composite act would be the adoption of a policy of apartheid, which involves systematic governmental conduct towards a racial group, taking the form of conduct in a whole series of cases. This may be compared with an act of racial discrimination against one individual. This might well be a complex act because of collusion between different organs or conduct against the individual over a period of time, but it will have involved the "same" case throughout. It should be stressed that some of the most serious wrongful acts under international law are defined in terms of their composite character. This is true not only of genocide and apartheid but of crimes against humanity generally.[231]

117. This analysis shows that it is possible to draw a distinction between composite and complex acts; it also shows that in order to make such a distinction it is essential to focus on the relevant primary rule. But the problem is, of course, that the draft articles are not concerned, as such, to elaborate upon the primary rules. Different classifications of primary rules may have value, but they have a place in the draft articles only to the extent that they have *consequences* within the realm of responsibility. Moreover, as formulated, the distinction between composite and complex acts is a distinction unrelated to the content of the primary rule. It is concerned with the classification of acts in breach of any rule whatsoever. That was true also for the distinction between continuing and completed

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[228] (1990) 20 UNRIAA 217, at p. 266. Cf. the dissenting opinion of Sir Kenneth Keith, at pp. 279–284.

[229] See paras. 38–44 above.

[230] Evidently this is drafting oversight: the commentary to article 25, para. 3, note 4, makes the point clearly.

[231] The better view is that apartheid is a special case of crimes against humanity: cf. Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, article 7 (1) (j) and (2) (h).

wrongful acts, but as we have seen, that is a useful and now accepted distinction for the purposes of responsibility. Is this also true for composite or complex acts?

118. Before answering that question, it is necessary to draw a distinction between the necessary *elements* of a wrongful act and what might be required by way of evidence or proof that such an act has occurred. For example, an individual act of racial discrimination is unlawful, but it may be necessary to adduce evidence of a series of acts by State officials (involving the same person or other persons similarly situated) in order to show that any one of those acts was discriminatory rather than actuated by legitimate grounds. In other words, in its essence such discrimination is not a composite or even, necessarily, a complex act but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act. Thus a clear and consistent distinction between complex and composite acts is difficult to draw in practice, and this difficulty is exacerbated by the language of article 25 (2), which refers to the accomplishment of the act or omission "which establishes the existence of the composite act"; the word "established" (French: "*établit*") might be confused with "proved", which was evidently not intended.

The treatment of composite acts in articles 18 (4) and 25 (2)

119. Three propositions are affirmed in the draft articles in relation to "composite acts":

(a) According to article 25 (2), a composite act "occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act". For the reasons explained, this might be better formulated in the following terms: "when that action or omission of the series occurs which, taken with its predecessors, is sufficient to constitute the composite act";

(b) Nevertheless, "the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act ... [for] so long as such actions or omissions are repeated" (ibid.);

(c) According to article 18 (4), in such a case "there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State."

120. It is not entirely easy to reconcile these propositions. If the act only "occurs" when that aspect of the "series" occurs which establishes the composite act, must the composite act necessarily be held to have commenced at an earlier date? (The position would no doubt be different if the word "establishes" meant "establishes as a matter of evidence", but for the reasons already given, this would be a confusion.) In particular, does it not depend on the formulation and purpose of the primary rule, not only whether a composite act may be considered to have been constituted by the 1st or the 5th or the nth act in a series (a matter which is rightly left open by the draft articles), but whether, so constituted, the period of the breach relates back to the first of these acts or omissions?

121. It is useful to examine these questions by reference to some concrete examples. The difficulty here is that virtually all the discussion of composite acts has been based on examples of primary rules which define systematic wrongs. A systematic primary rule is one which defines acts as wrongful in terms of their composite or systematic character (the prohibition against genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, etc.). But as noted above, article 25 (2) is not limited to breaches of obligations created by such rules. Thus it is necessary to take examples both of systematic and non-systematic primary rules in order to test the idea of a "composite wrongful act".

The prohibition against genocide, formulated in identical terms in the 1948 Convention and in later instruments,[232] is a good example of a "systematic" primary rule, in the sense that it implies, if it does not actually require, that the responsible entity (including a Government) will have adopted a systematic policy or practice, and that the individual acts of murder, etc., which together constitute genocide, would not or might not do so taken individually. According to article II (a) of the 1948 Convention, the prime case of "genocide" is "killing members of [a national, ethnical, racial or religious group]" with the intent to destroy that group as such, in whole or in part. Both limbs of the definition contain systematic elements. Killing one person, whatever the motive, is not genocide; the killing has to be multiple.[233] And it has to be carried out with the relevant intention, aimed at physically eliminating the group as such. In that context, the idea of a composite wrongful act elaborated in articles 18 (4) and 25 (2) seems entirely appropriate. Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. But once that threshold is crossed, it is reasonable to say that the time of commission extends over the whole period during which any of the acts was committed. Assuming that the intertemporal law applies to genocide, it is also reasonable to say that genocide is committed if the acts committed during the period when the Convention was in force were sufficient to constitute genocide.[234]

Take, on the other hand, a simple obligation in a bilateral boundary waters agreement that each party will take no more than a specified volume of water from a boundary river in a calendar year. Assume that one of the parties authorizes different users to take each month volumes of water that (while not themselves unlawful under the agreement) make it likely that over the year the total taken will exceed the quota. The conduct of the State concerned amounts to a composite act as defined in article 25 (2), but is the whole series of acts to be treated as unlawful? The approach of the majority in the *Case concerning the Gabčikovo-Nagymaros Project*[235] suggests that at least until the act occurs which predetermines the final decision to exceed the quota, no wrongful act will have been committed. Indeed, it might be that no wrongful act is committed until the quota is actually exceeded, however clear it may be that this

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[232] See, e.g., Statute of the International Tribunal for the Former Yugoslavia, article 4 (text in Security Council resolution 827 (1993) of 25 May 1993); Statute of the International Criminal Tribunal for Rwanda, article 2 (text in Security Council resolution 955 (1994) of 8 November 1994); Rome Statute of the International Criminal Court of 17 July 1998, A/CONF.183/9, article 6.

[233] As Judge ad hoc Lauterpacht acknowledged in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Admissibility of Counterclaims), I.C.J. Reports 1997*, p. 239, at p. 282. This does not mean that a camp guard who participated in genocidal acts but was personally responsible for killing only one member of the group would necessarily be innocent: such conduct committed with the necessary intent would clearly involve complicity in genocide contrary to article III (e) of the Convention.

[234] It is, however, very doubtful that the intertemporal law applies to the Genocide Convention *as such*, since according to article I of the Convention it is declaratory, and it is therefore probable that the obligation to prosecute relates to genocide whenever committed. The International Court clearly acted on this basis in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections), I.C.J. Reports 1996*, p. 591, at p. 617 (para. 34). Note also that, even in the case of a new substantive obligation, conduct committed prior to the entry into force of the obligation might be relevant *as facts*, e.g. for the purposes of determining intent. This is true, *a fortiori*, where the objection *ratione temporis* relates only to the jurisdiction of the court or tribunal, not the content of the applicable law: see, e.g., *Zana v. Turkey*, ECHR, judgement of 25 November 1997. See also footnote 87 above.

[235] Para. 106 above.

> result is going to occur. Assuming that it does occur, do we then say that the commission of the breach began with the first taking of water in January? Perhaps if the State set out with the deliberate intention to violate the treaty and gave monthly permits accordingly, one might say that the breach began in January. But the definition of a composite act in article 25 (2) does not require such a prior intent; it is satisfied if there is "a series of actions or omissions in respect of separate cases", and in the example given, a breach might occur fortuitously, because different regional water authorities did not coordinate their licensing policies, or for some other reason. Of course, there is a breach when the annual quota is exceeded, but is there any reason to define in advance, in the secondary rules of State responsibility, that the breach began with the first act in the series? Does it not depend on the formulation and purpose of the primary rule?

122. These examples suggest that, if composite acts are to be dealt with, a distinction needs to be drawn between simple and composite or systematic obligations. Just because a simple obligation is breached by a composite act seems no reason for treating the breach as different in kind. No doubt composite acts are more likely to give rise to continuing breaches, but simple acts can cause continuing breaches as well (e.g. the detention of a diplomat). The position is different, however, where the obligation itself (and thus the underlying primary rule) fixes on the cumulative character of the conduct as constituting the essence of the wrongful act. Thus apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically motivated killing.

123. Such a distinction was drawn by the European Court of Human Rights in *Ireland v. United Kingdom*. There Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland, which it said amounted to torture or inhuman or degrading treatment, and the case was held to be admissible on that basis. This had various procedural and remedial consequences. In particular, the exhaustion of local remedies rule did not have to be complied with in relation to each of the incidents cited as part of the practice. But the Court denied that there was any separate wrongful act of a systematic kind involved. It was simply that Ireland was entitled to complain of a practice made up by a series of breaches of article 7 of the Convention, and to call for its cessation. As the Court said:

> "A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system; *a practice does not of itself constitute a violation separate from such breaches* ... The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in article 26 of the Convention, applies to State applications ... in the same way as it does to 'individual' applications ... On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice."[236]

By contrast in the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed.

124. For these reasons, the Special Rapporteur is provisionally in favour of retaining the notion of "composite wrongful acts", as spelled out in articles 18 (4) and 25 (2), but of limiting it to what might be termed "systematic obligations". These are obligations arising

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[236] *ECHR Ser. A*, No. 25 (1978), at p. 64 (para. 159); see also ibid., at p. 63 (para. 157).

under primary rules which define the wrongful conduct in composite or systematic terms (as in the case of genocide or crimes against humanity). Such systematic obligations are important enough in international law to justify special treatment, both in terms of the time of their commission and the application of the intertemporal law. As to obligations under other primary rules, these issues can be adequately dealt through the interpretation and application of the particular rule.

The treatment of complex acts in articles 18 (5) and 25 (3)[237]

125. Complex acts are defined in articles 18 (5) and 25 (3) as acts "constituted by actions or omissions by the same or different organs of the State in respect of the same case". The treatment of complex acts in articles 18 (5) and 25 (3) is strongly influenced by the approach taken by Special Rapporteur Ago to the question of exhaustion of local remedies (article 22), which is discussed below. According to this approach, the failure of a local remedy is itself part of the complex act of State, with the consequence that, in cases where the exhaustion of local remedies rule applies, the wrong is constituted by the failure of the local remedy, and prior to that point is merely apprehended.[238]

126. However, the notion of a complex act is not dependent for its validity on accepting this view of the local remedies rule, and there are examples of complex acts in the sense of article 25 (3) which do not involve the exhaustion of local remedies. For example, the guarantee against discrimination under article XIII (1) of the GATT could easily be breached by a complex act of the importing State. Similarly, in the case of a denial of justice, where the original wrong to the individual concerned was not itself attributable to the State,[239] it may be the successive failure of the police, the lower courts and any available appellate courts collectively to redress the grievance that amounts to a denial of justice. Such a "complex act" of the State, if it falls short of the relevant international standard, will involve a breach of international law.

127. According to article 25 (3), in such cases the breach only occurs "at the moment when the last constituent element of that complex act is accomplished". However, the "time of commission of the breach extends over the entire period" of the complex act, and under article 18 (5), the principle of the intertemporal law is satisfied if the first act in the series occurred when the obligation was in force for the State, even if the obligation then lapses.

128. These propositions may be tested against the facts of the *Gabčikovo-Nagymaros* case. Czechoslovakia's conduct in implementing Variant C was clearly a complex act. It involved a series of actions by different organs of the State, and by a private company acting as the constructor and operator of the project. The Court held that the wrongful act was not committed until the Danube was actually diverted in October 1992.[240] It is clear that in doing so it applied the law in force at that time, and not at any earlier time. If Hungary's argument based on termination in May 1992 (e.g. on grounds of fundamental change of circumstances) had succeeded, the law in force in October would have been different.[241] Thus rather than treating the whole period from October 1991 onwards as the time of commission of the

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[237] See especially J. J. A. Salmon, "Le fait étatique complexe: une notion contestable", *Annuaire français de droit international*, 28 (1982), pp. 709–738; E. Wyler, *L'Illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 74–81.

[238] See paras. 138–139 below.

[239] Among many examples, see the *Janes Claim*, 4 UNRIAA 82 (US-Mexican General Claims Commission, 1926), where the original murder of Janes was a purely private act.

[240] See para. 104 above.

[241] A Boundary Waters Convention of 1976 would have governed the issue, but for the *lex specialis* of the 1977 Treaty.

breach, the Court ascertained the time at which the breach was essentially accomplished, despite earlier preparations, and applied the law in force at that time to the breach.

129. Another hypothetical example suggests the same conclusion. Assume that State A agrees in a bilateral investment treaty that for a period of three years it will not expropriate a particular property and that thereafter it will pay a specified amount of compensation for any expropriation. Assume further that, two and a half years later, it begins to impose restrictions on the use of the property, and that, after the initial three-year period, a number of limitations have the effect of rendering the property valueless, followed some months later by a formal taking. This process of expropriation is clearly a "complex act", but of the three propositions contained in the draft articles, two at least do not apply to it. First of all, there is no reason to say that the last act in the series constitutes the time of the breach; on these facts it may very well be that the expropriation should be considered as completed at an earlier date. Secondly, however, if the restrictions imposed during the three-year period did not themselves amount to an expropriation,[242] there would be no basis for applying the law in force during those three years to the later conduct of the State, and the remedy for expropriation would be the payment of the specified amount.

130. The treatment of "complex acts" in the draft articles is vulnerable in other respects as well. For example, a sharp distinction is drawn between composite and complex acts. In the case of composite acts, one looks for the first act in the series which, taken with the earlier ones, is sufficient to constitute the breach (call it the "culminating act"). In the case of complex acts, one looks to the last act in the series. Why such a difference should exist is not explained. At the time the culminating act is performed, it may not be clear that further acts are to follow and that the series is not complete. Yet if up to that point the injured State is justified in holding that a wrong has been committed, why should it not be able to act on that basis at that time? A similar objection can be made by reference to the intertemporal law as provided in article 18 (5). Until the series is complete, one may not know precisely how to characterize the wrongful act: for example, in *Foremost-McKesson*, whether it is a case of discrimination against foreign shareholders or a de facto expropriation.[243] Yet the application of the law in force at the time the first act in the series occurs may depend on how the whole series is to be characterized. The issue of intertemporal law is thus made uncertain and to some extent subjective. This is exacerbated in that the distinction between composite and complex acts depends on what is identified as the relevant "case", yet this can be done in different ways. As in *Ireland v. United Kingdom*, for example, the applicant may focus on a "practice" of which individual incidents are merely examples. Is the practice then the "case", or is it the individual incidents which are adduced, non-exhaustively, to prove the practice?[244] The distinction between complex and composite acts depends on the unspecified notion of a "case", yet important consequences in terms of the intertemporal law turn on the distinction. Issues of such importance should not depend on the way in which the injured State chooses to formulate the claim. In any event, it is far from clear why, in principle, the law in force at the time of the first act in a series should apply to the whole series. Either the individual acts are to be assessed individually, in which case the law in force at the time each was committed should be applied, or they are to be assessed as a series, in which case the rule applicable to composite acts seems equally appropriate. On

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[242] Cf. *Foremost Tehran Inc. v. Government of the Islamic Republic of Iran* (1986), 10 Iran-US CTR 228, where the Iran-United States Claims Tribunal held that the acts in question did not constitute an expropriation by the terminal date of the Tribunal's jurisdiction.

[243] Ibid.

[244] See also the United States counterclaim in the *Case concerning Oil Platforms, I.C.J. Reports 1998* (Order of 10 March 1998), which likewise focuses on a general situation rather than specific instances.

neither alternative is there any reason to freeze the applicable law as it was on the date when the complex act began.[245]

131. For these reasons, it is recommended that paragraphs 18 (5) and 25 (3) be deleted and with them the notion of the "complex act".[246] International courts and tribunals seem to have had no difficulty in dealing with such acts, whether in terms of the time of their commission or the intertemporal law, and no special provision for them seems to be required in the draft articles.

The temporal classification of obligations of prevention: Article 26

132. Article 26 relates closely to article 23, and the comments made already with respect to article 23 apply here as well. It is true that there are "pure" obligations of prevention, of the kind described in the commentary. They are true obligations of prevention in the sense that unless the apprehended event occurs there is no breach. At the same time, the State has not warranted that the event will not occur; it has undertaken an obligation in the nature of best efforts to prevent it from occurring, the content and rigour of that obligation depending on the primary rule. As noted above, however, not all obligations directed towards preventing an event from occurring are of this kind, and it is not the function of the draft articles to force all such obligations into a single form.

133. There is a further difficulty with the formulation of article 26, in that it assumes that the occurrence of an event which has a continuing character will involve a continuing breach by the State which has wrongfully failed to prevent it. This may well be the case — for example, with the obligation to prevent transboundary damage by air pollution, articulated in the *Trail Smelter* arbitration,[247] or the obligation to prevent intrusions onto diplomatic premises.[248] But again, circumstances can be imagined where this is not so, e.g. where the event, once it has occurred, is irreversible, or its continuance causes no further injury to the injured State. An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation will not necessarily be of a continuing character, since it may be that once the information is published, the whole point of the obligation is defeated. It is thus necessary to qualify article 26 by the addition of the same phrase as is contained in article 25 (1) ("and remains not in conformity with the international obligation").

134. Subject to this proviso, article 26 is a useful additional qualification to the proposed article dealing with completed and continuing wrongful acts. It is useful to emphasize that, in the case of obligations of prevention, the occurrence of the event in question will normally give rise to a continuing wrongful act (i.e. unless the event itself ceases, or the obligation ceases to apply to it). Indeed, in such cases the wrongful act may be progressively aggravated by the failure to suppress it. On this basis, it seems sensible to include this

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[245] One unstated reason for the retrospective element in article 18 (5) was that this was necessary in order to defend article 22. According to that article, the exhaustion of local remedies is part of the breach and not only a condition to the admissibility of a diplomatic claim, and it involves a complex act. In such cases, however, it is clear that one looks to the law in force at the time when the injury occurred, not to the law in force when the local remedy was exhausted. See paras. 143–144 below.

[246] Apart from the comments of Governments (reviewed above, para. 99), this conclusion is strongly supported in the literature. Thus, Salmon, loc. cit., at p. 738, finds the notion of complex acts "confusing ... dangerous ... [and] useless". Pauwelyn, loc. cit., at p. 428 describes article 25 (3) as "highly debatable". See also Karl, loc. cit., p. 102; Wyler, *L'Illicite et la condition des personnes privées* (Paris, Pedone, 1995), p. 89; Brownlie, *State Responsibility*, p. 197 ("of doubtful value").

[247] (1938, 1941) 3 UNRIAA 1905.

[248] See *Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at pp. 35–36.

provision as a further paragraph in the proposed article dealing with the distinction between completed and continuing wrongful acts.

Conclusions on articles 18 (3) to (5) and 24 to 26

135. For these reasons, it is recommended that articles 18 (3) to (5) and 24 to 26 be replaced by two articles, one dealing with the distinction between completed and continuing wrongful acts, the other dealing with breach of certain obligations of a systematic or composite character.[249]

(h) Article 22: Exhaustion of local remedies

136. Article 22 provides as follows:

> "When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment."

137. According to its title, article 22 deals with the well-known principle of exhaustion of local remedies ("the treatment to be accorded to aliens, whether natural or juridical persons"). These are analysed within the framework of "complex" obligations of result, as dealt with in article 21 (2).

138. The lengthy commentary to article 22 emphasizes this point. In the case of obligations in the field of diplomatic protection:

> "If the [injured foreigner] take no action, the situation created by the initial conduct of the State running counter to the internationally desired result cannot be rectified by subsequent action of the State capable of replacing that situation by one in conformity with the result required by the obligation ... The case here is quite different from that in which, despite the necessary initiative having been taken by the individuals concerned to obtain redress, the situation created by the initial conduct is confirmed by a new course of conduct of the State, which is likewise incompatible with the internationally required result."[250]

But this implies that the refusal of a local remedy will itself be internationally wrongful. This may be so, as where the local court discriminates against the foreigner, or acts arbitrarily, contrary to the applicable standards of treatment. But in other cases, the exhaustion of local remedies will not involve any new or continuing wrongful conduct. It will simply confirm that, in accordance with the internal laws and procedures of the respondent State, no further local remedy is available.[251] In such cases the local remedy is a failed cure, not part of the illness itself.

139. The commentary goes on to argue that:

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[249] See para. 156 below for the proposed text.

[250] Commentary to article 22, para. (3).

[251] Cf. the local remedies considered in the *ELSI* case: *Case concerning Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports 1989*, p. 15.

> "If, so long as the condition of exhaustion of local remedies has not been satisfied, the injured State has no faculty to claim reparation for an internationally wrongful act allegedly committed to its detriment in the person or property of its national, it is because for the time being its new right to reparation of an injury suffered by it has not yet been created. In other words, a breach of the obligation imposed by the treaty has not yet occurred or, at least, has not yet definitively occurred."[252]

But the fact that the third State may not be able to espouse the claim in terms of reparation for injury to its nationals until local remedies have been exhausted does not mean that that State has no legal interest to protect at an earlier time.[253] For example, it may have a strong interest in the cessation of the wrongful act.

Government comments on article 22

140. France suggests that it should be made clear that the exhaustion of local remedies "is limited to diplomatic protection".[254] Germany queries both the location of and the need for article 22, and notes that it should not apply "in cases of grave violations of the law on the treatment to be accorded to aliens that constitute, at the same time, violations of [their] human rights".[255] The United Kingdom goes further, arguing carefully for a "procedural" view of the exhaustion of local remedies rule.[256] At the same time it suggests that the rule should be held to apply to injuries occurring outside the respondent State's territory, except perhaps in cases of egregious breach.[257]

The scope of the local remedies rule

141. The local remedies rule was described by a Chamber of the Court in the *ELSI* case as "an important rule of international law".[258] In the context of a claim brought on behalf of a national (including a corporation) of the claimant State, the Chamber defined the rule succinctly in the following terms:

> "for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success."[259]

The Chamber thus treated the rule as one relating to the admissibility of claims within the field of diplomatic protection. It treated the exhaustion of local remedies as being distinct, in principle, from "the merits of the case".[260] This is the orthodox understanding of the rule.

142. By contrast, article 22 conceives the exhaustion of local remedies within the framework of article 21 (2), in the following terms: "when the conduct of a State has created a situation not in conformity with the result required of it by an international obligation

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[252] Commentary to article 22, para. (15).

[253] Cf. *Phosphates in Morocco (Preliminary Objections), P.C.I.J. Series A/B*, No. 74 (1938), at p. 28. See, however, the commentary to article 22, para. (59).

[254] A/CN.4/488, p. 69.

[255] Ibid.

[256] Ibid., pp. 69–71. The same point was made by Germany in its comments of 1981: *Yearbook ... 1981*, vol. II, Part One, pp. 75–76.

[257] A/CN.4/488, p. 71.

[258] *Case concerning Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports 1989*, p. 15, at p. 42 (para. 50). See also *Interhandel Case, I.C.J. Reports 1959*, p. 6, at p. 27.

[259] *I.C.J. Reports 1989*, p. 15, at p. 46 (para. 59).

[260] Ibid., p. 48 (para. 63).

concerning the treatment to be accorded to aliens ... but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State". In such cases, according to article 22 the breach of obligation occurs only if, and when, the effective local remedies are exhausted. As to this, several points need to be made.

143. However, most of the situations covered by the exhaustion of local remedies rule are not of this character.[261] For example, there is a general international obligation on all States not to discriminate arbitrarily against aliens. The precise content of this obligation need not concern us here. The point is that it is clear (a) that the exhaustion of local remedies rule applies to claims for breach of this obligation, and (b) that, nonetheless, this is not a case where the State has a choice of discriminating against aliens, on condition that it offers them compensation.[262] It is obliged not to discriminate in the first place. In such cases, the breach of international law occurs at the time when the treatment occurs. The breach is not postponed to a later date when local remedies are exhausted, or when some equivalent redress is offered. In such cases, the breach of international law having already occurred, the exhaustion of local remedies is a standard procedural condition to the admissibility of the claim.[263]

144. It is true that there are cases where "the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State". An example is provided by the common provision in many bilateral investment protection treaties, to the effect that investments may not be expropriated "except for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and upon payment of compensation".[264] In a case where a non-discriminatory but uncompensated expropriation occurs, it is the failure to compensate which constitutes the gist of the breach, and this failure may be judged to have occurred at a time subsequent to the taking. Nonetheless, the failure is still analytically distinct from the exhaustion of local judicial remedies, and the breach in such a case would occur at the time the failure to compensate definitively occurred, whatever form that failure took.[265]

145. There may also be cases where the failure to provide an adequate local remedy is itself the relevant internationally wrongful act. This is so, for example, where the injury to the

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[261] See para. 74 above.

[262] See paras. 62–63 above.

[263] Thus the exhaustion of local remedies rule can be waived, as the Chamber in the *ELSI* case noted: *I.C.J. Reports 1989*, p. 15, at p. 42 (para. 50). See also the resolution on the exhaustion of local remedies rule, adopted in 1956 by the Institut de Droit International, according to which "the rule does not apply ... in cases where its application has been waived by agreement of the States concerned" (*Annuaire* ..., vol. 46, 1956, p. 358). But if there is no breach,, there would be no international claim in the first place. The same point might be made by reference to those cases where it was held that a State was estopped from raising the exhaustion of local remedies, by its failure to raise it at a preliminary stage: e.g., *ECHR, Ayden v. Turkey*, judgement of 25 September 1997. See also *Ireland v. United Kingdom Case, ECHR, Series A*, vol. 25 (1978), cited above, para. 123.

[264] See, e.g., People's Republic of China-France, Agreement concerning the Reciprocal Encouragement and Protection of Investments, Paris, 30 May 1984, article 4 (2): (1985) 24 ILM 550.

[265] For example, the enactment of a law expropriating property and expressly excluding any compensation would constitute a breach of such a treaty provision, but the exhaustion of local remedies rule would be a prerequisite to the admissibility of an international claim on behalf of any person so expropriated. Thus, for example, the affected owner might need to challenge the constitutionality of the law, if such a challenge were available. See, e.g., the judgement of the European Court of Human Rights in the case of *Lithgow and Others, ECHR*, vol. 102 (1986), at p. 74 (para. 206); and the decision of the European Commission of Human Rights, No. 27/55, 31 May 1956, *in* European Commission of Human Rights, *Documents and Decisions, 1955–1956–1957*, p. 139.

alien is caused by conduct not attributable to the State,[266] or where the violation involves a breach of due process standards, laid down in a treaty or by general international law, which occurs at the time of seeking the remedy.[267] But this is clearly not the situation to which article 22 is directed, since in such cases the basis of the claim brought to the State court is not itself a "situation not in conformity with the result required of [the State] by an international obligation". Rather, that situation occurs subsequently, when the court's own action conflicts with the State's obligation.

When is a breach of international law involving the treatment of aliens committed?

146. The formulation in article 22 is strongly reminiscent of the Italian argument in the *Phosphates in Morocco Case (Preliminary Objections).*[268] In that case France had only accepted the jurisdiction of the Court with respect to "situations or facts subsequent to" 1931. Part of Italy's claim related to the dispossession of certain Italian nationals arising from a decision of the Moroccan Mines Department in 1925. It was argued that the decision of 1925 "only became definitive as a result of certain acts subsequent to the crucial date and of the final refusal to remedy in any way the situation created in 1925", and that this refusal only occurred after 1931.[269] The Court rejected this argument (by 11 votes to 1). In its view, the 1925 decision was the unlawful act, and the subsequent refusal to alter that decision merely marked "a phase in the discussion which had arisen" following the decision of 1925, and was not an independent source of complaint:

> "it is in that decision that we should look for the violation of international law — a definitive act which would, by itself, directly involve international responsibility. This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States. In these circumstances, the alleged denial of justice ... merely results in allowing the unlawful act to subsist."[270]

As this language implies, the Court was not concerned with the question whether the allegedly unlawful conduct of France on behalf of Morocco involved a continuing unlawful act; indeed the Court implied that there was such an act.[271] The question was whether the alleged illegality arose prior to 1931 for the purposes of applying France's Optional Clause reservation, and the Court held that it did. This holding (although concerned with the Court's jurisdiction rather than the substance of State responsibility) directly contradicts the language of article 22.[272]

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[266] See the decisions of the Mexico/United States of America General Claims Commission in the *Neer* case (1926), 4 *UNRIAA*, pp. 60–66 and the *Janes* case (1926), ibid., pp. 82–98.

[267] See, for example, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 2 (3) of the International Covenant on Civil and Political Rights, article 13 of the European Convention on Human Rights and article 25 of the American Convention on Human Rights.

[268] *P.C.I.J. Series A/B*, No. 74 (1938). For discussion of the case, see commentary to article 22, paras. (25)–(28).

[269] Ibid., at p. 27.

[270] Ibid., at p. 28.

[271] On this point Judge van Eysing agreed. His dissent turned on the interpretation of the French Declaration: at pp. 34–35. Judge Cheng stressed that "[t]he monopoly, though instituted by the legislation of 1920, is still existing today. If it is wrongful, it is wrongful not merely in its creation but in its continuance" (at p. 36). This was no doubt correct, but it fails to address the point at issue. The French reservation was in the following terms: "... on all *disputes that may arise after* the ratification of the present declaration relating to *situations or facts subsequent to the said ratification*" (emphasis added). The Court, adopting a restrictive interpretation of the French reservation, held that the dispute both related to and arose from situations or facts prior to the critical date: at pp. 24, 26–27. For the Court, it was not relevant that those situations or facts gave rise to a continuing wrongful act extending in time after the critical date. No *new* dispute arose after that date, but only the continuation of an existing dispute.

Conclusions on article 22

147. For these reasons (in addition to those given in relation to articles 21 and 25 (3)), article 22 cannot stand. The question is whether it should simply be deleted or replaced by some other provision dealing with the exhaustion of local remedies. There is a case for simple deletion, since it is not in general the function of the draft articles to deal with questions of the admissibility of international claims. Moreover, the satisfactory formulation of the local remedies rule would require more than a single article. Issues to be considered include the definition of "local remedies" and of their exhaustion,[273] the distinction between "direct" State-to-State claims (to which the rule does not apply) and "indirect" claims to diplomatic protection (to which it does apply),[274] the application of the local remedies rule to other cases, e.g. those involving breaches of human rights irrespective of nationality,[275] the application of the rule to injuries occurring outside the territory of the respondent State,[276] whether there should be an exception to the rule for cases of egregious breach, or for mass violations,[277] and the issue of waiver.[278] These questions will be considered further by the Commission in its work on the topic of diplomatic protection.[279] On the other hand, claims on behalf of aliens have historically been a major basis for State responsibility, and the exhaustion of local remedies rule does constrain claims for the breach of an international obligation, which is the subject matter of Chapter III. A satisfactory balance would be achieved if article 22 were reformulated as a "without prejudice" clause, leaving its detailed operation to be dealt with by the Commission in its work on diplomatic protection.[280]

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[272] See also the *Finnish Ships* Arbitration, UNRIAA, vol. III (1934), at p. 1484, and the *Panevezys-Saldutiskis Railway Co.* case, *P.C.I.J., Ser. A/B*, No. 76 (1939).

[273] Briefly discussed in the commentary to article 22, paras. (47)–(51).

[274] An associated question is whether the exhaustion of local remedies rule applies to injuries to State organs, agents and corporations: see commentary to article 22, paras. (43)–(45).

[275] The Commission decided that it was premature to express a view on this issue, noting that the human rights treaties contained an express stipulation to that effect: Commentary to article 22, para. (46). On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, among others, C. F. Amerasinghe, "The Rule of Exhaustion of Domestic Remedies in the Framework of International Systems for the Protection of Human Rights", *Z.a.ö.R.V.*, vol. 28, 1968, p. 257; A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights*, Cambridge University Press, Cambridge, 1983; J. Guinand, "La règle de l'épuisement des voies de recours internes dans le cadre des systèmes internationaux de protection des droits de l'homme", *Revue belge de droit international*, vol. 4, 1968, p. 471; D. Sulliger, *L'épuisement des voies de recours internes en droit international général et dans la Convention européenne des Droits de l'homme* (Imprimerie des Arts et Métiers, Lausanne, 1979); Wyler, *L'Illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65–89.

[276] This is discussed in detail in the commentary to article 22, paras. (38)–(42).

[277] See *Ireland* v. *United Kingdom, ECHR, Series A*, vol. 25 (1978).

[278] On the exhaustion of local remedies rule generally, see further C. F. Amerasinghe, *Local Remedies in International Law*, Grotius, Cambridge, 1990; A. A. Cançado Trindade, "The Birth of State Responsibility and the Nature of the Local Remedies Rule", *Revue de droit international, de sciences diplomatiques et politiques*, vol. 65, 1978, 157; J. Chappez, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doehring, "Local Remedies, Exhaustion of", *in* R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 1, 1981, pp. 136–140; G. Perrin, "La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la C.D.I.", *Festschrift für R. Bindschedler*, Stämpfli, Bern, 1980, pp. 271–291.

[279] See M. Bennouna, Preliminary Report on diplomatic protection, A/CN.4/484 (1998), esp. paras. 18 and 55.

[280] For the text of the proposed provisions, see para. 156 below.

148. As to the placement of the proposed article, there is a case for including it in Part Two of the draft articles, since it relates to the implementation of responsibility more than to its origins. For the time being, however, the article can remain part of Chapter III. The question of its placement can be reconsidered once the content of Part Two is determined.

3. Other issues relating to breach of an international obligation

149. Two further issues need to be considered within the framework of Chapter III.

(a) The spatial effect of international obligations and questions of breach

150. The first concerns the potential relevance of considerations *ratione loci* for the breach of an international obligation. Articles 12 and 13 (as adopted on first reading) dealt with the conduct of a third State or organization on the territory of a State. They provided that the location of such conduct was not, as such, a ground for it to be attributed to the host State. But there is no article in Part Three that deals with "the spatial dimension of wrongfulness".[281] This is slightly paradoxical. It is difficult to conceive of location as decisive for attribution (either conduct is that of the State or it is not),[282] whereas there is no doubt that where an act has occurred (within the territory of a State, or at least on territory within its jurisdiction or control) can be very relevant to the question whether there has been a breach of an obligation. The link between the two found its classical expression in the dictum of Arbitrator Huber in the *Spanish Zone of Morocco Claims*, where he said that "State responsibility, in certain conditions, vis-à-vis another State with regard to nationals of the latter State seems to have always been understood as being limited to events taking place within the territory of the responsible State. Responsibility and territorial sovereignty are interdependent."[283] A more recent formulation is that of the International Court in the *Namibia Opinion*, when it said that "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States".[284] Many primary rules are formulated by reference to the territoriality of the conduct: for example, the rule invoked by the Court in the *Corfu Channel* case that every State has an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States".[285]

151. Support for the inclusion of a provision on this issue might be sought from article 29 of the Vienna Convention on the Law of Treaties, which deals with the territorial scope of treaties. It provides that:

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[281] To use the description of Wyler, in one of the few treatments of the problem: E. Wyler, *L'Illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 92–119.

[282] It was partly for that reason that the deletion of articles 12 and 13 was recommended and provisionally accepted by the Commission in 1998: First Report, A/CN.4/490/Add.5, paras. 252–262.

[283] (1924) 2 UNRIAA, p. 630, at p. 636. At issue was the responsibility of Spain for the conduct of its nationals in the International Zone of Tangier. Subsequently, in Claim No. 28, the Arbitrator held that:

> "Since the harm was caused in the International Zone, responsibility may be attributed to the authorities in the Spanish Zone in only two cases: either where they have tolerated the organization on their territory of gangs of bandits who have penetrated the International Zone, or where they have failed in their duties concerning the prosecution of offences committed by persons located in the zone under their administration."

Ibid., at pp. 699–700. See, further, ibid., at pp. 707–710.

[284] *I.C.J. Reports 1971*, p. 16, at p. 54, and see the discussion in First Report, A/CN.4/490/Add.5, paras. 253–254.

[285] *I.C.J. Reports 1949*, p. 4, at p. 22.

> "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

Article 29 might be taken to imply, *a contrario*, that treaties are prima facie not binding on their parties in respect of conduct occurring outside their territory. But this is certainly not the case. Whether a treaty covers conduct of a State party abroad depends on the interpretation of the treaty, and there does not appear to be any presumption one way or the other. In some cases (e.g. uniform law treaties, or rules with respect to the treatment of foreign investment), it will be clear from the treaty or from its object and purpose that the only conduct expected of the State is conduct in its own territory. But in many other cases, the State will have assumed responsibility with respect to its conduct wherever occurring. For example, the obligations on States not to commit genocide or torture apply to their conduct anywhere in the world.[286] On the other hand, it is true that the *incidence* of certain obligations may be different in respect of the territory of a State than in respect of its conduct abroad; for example, there is a broader range of situations in which a State can use armed force on its own territory as compared with a use of force on the territory of a foreign State or on the high seas.

152. Thus, rather than dealing with the general question of the scope of treaty obligations *ratione loci* (as it might appear to do), article 29 of the Vienna Convention is really concerned with the question of whether a State is bound by a treaty with respect to all its component territories (including component units of a federal State, overseas territories, etc.). This is a matter expressly addressed in many treaties, but unless it is addressed, the treaty applies to the whole territory of each State party. Thus a State cannot claim an exemption from compliance with a treaty in respect of conduct occurring, for example, within a component colony or province. Article 29 does not address the question whether the treaty obligation only applies in respect of particular territory or whether it applies to conduct of the State wherever occurring.[287]

153. Article 29, like specific territorial application clauses in treaties, is concerned with the scope of the obligation and not with issues relating to its breach. The draft articles take as they find them the primary rules of international law giving rise to obligations. They are not concerned with questions of the territorial scope of primary rules any more than with other questions of their content or interpretation. It is true that developments in the past 15 years — for example, the *Soering* case,[288] the *Loizidou* case[289] and the *Bosnian Genocide* case[290] — have shown the potential scope *ratione loci* of many primary rules which may have been thought to apply exclusively to the territory of the State itself. In each case,

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[286] As the Court held in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Preliminary Objections), I.C.J. Reports 1996*, p. 595, at p. 616 (para. 31).

[287] In its commentary to that provision (article 25 in the 1966 draft), which read: "Unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party", the Commission mentioned proposals made by Governments to cover in the article the issue of the extraterritorial application of treaties. But it added that "[t]he article was intended ... to deal only with the limited topic of the application of a treaty to the territory of the respective parties ... In its view, the law regarding the extraterritorial application of treaties could not be stated simply in terms of the intention of the parties or of a presumption as to their intention; and it considered that to attempt to deal with all the delicate problems of extraterritorial competence in the present article would be inappropriate and inadvisable": *Yearbook ... 1966*, vol. II, pp.213–214 (para. 5).

[288] *ECHR, Ser. A*, No. 161 (1989), at pp. 35–36 (para. 91).

[289] *ECHR, Preliminary Objections*, Ser. A, No. 310 (1995), para. 62, and *Merits*, judgement of 18 December 1996, para. 52.

[290] *I.C.J. Reports 1996*, p. 595.

however, it was a question of the content or interpretation of the relevant primary rule that was at stake, and not any secondary rule of responsibility. These developments might usefully be mentioned in the commentary to article 16, but there does not seem to be any basis to formulate any article (parallel to article 29 of the Vienna Convention) dealing with the question of responsibility *ratione loci* for the breach of an obligation.

(b) Possible distinctions between breaches by reference to their gravity

154. Secondly, many legal systems draw distinctions for various purposes between more and less serious breaches of obligation, and international law is no exception. Thus only a "material breach" gives a right to terminate a bilateral treaty,[291] and under Part Two of the draft articles the seriousness of a breach is relevant for various purposes, including the extent and form of reparation and the proportionality of possible countermeasures. In State responsibility cases more generally, courts and tribunals sometimes take the opportunity to stigmatize a breach as particularly serious,[292] or, less often, to mention possibly mitigating factors.[293] This is quite apart from cases where the primary rule is defined in terms of a certain level of seriousness,[294] or where more serious breaches are singled out for additional consequences.[295]

155. However, there does not appear to be any basis for distinguishing between different degrees of breach, at least for the purposes of Chapter III. The jurisprudence of claims tribunals, of the Iran-United States Claims Tribunal and of human rights courts and committees suggests that there is no systematic distinction between more and less serious breaches in terms of the existence (as distinct from the consequences) of a breach. In Part Two of the draft articles, different distinctions are drawn between the degrees of seriousness of breaches for different purposes,[296] and further distinctions may be needed. But no systematic distinction between more and less serious breaches seems to be necessary in Chapter III itself.

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[291] Vienna Convention on the Law of Treaties, 1969, article 60 (1). Material breach is defined as an unlawful repudiation, or a violation of any provision "essential to the accomplishment of the object or purpose of the treaty". The focus is on the significance of the provision, not of the violation, which seems slightly odd. Under most national legal systems, the materiality of a breach would require consideration of both factors. But see the commentary to this provision (article 57 in the 1966 ILC draft), in which it is said that "the right to terminate or suspend must be limited to cases where the breach is of a serious character" (*Yearbook ... 1966*, vol. II, p. 255, para. 9).

[292] See, for example, the *Case Concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 42 (para. 91), in which the Court notes that "what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised".

[293] In the *Case Concerning the Gabčikovo-Nagymaros Project*, the Court began its examination of Slovakia's responsibility by referring to "the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty" (*I.C.J. Reports 1997*, p. 3, at p. 52). But the Court concluded that Slovakia's responsibility was nonetheless engaged by its conduct after the suspension and withdrawal of its consent by Hungary.

[294] See, e.g., article 7 ("Obligation not to cause significant harm") of the Convention on the Law of the Non-navigational Uses of International Watercourses, 21 May 1997, General Assembly resolution 51/229, annex.

[295] See, for example, the notion of "grave breaches" referred to in the four Geneva Conventions of 1949 (Convention I, article 50; Convention II, article 51; Convention III, article 130; Convention IV, article 147).

[296] See article 45 (2) (c) and article 49.

4. Summary of proposals concerning Chapter III

156. For the reasons given, the Special Rapporteur proposes the following articles in Chapter III. The notes appended to each article explain very briefly the changes that are proposed.

Chapter III

Breach of an international obligation

Article 16

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State does not comply with what is required of it under international law by that obligation, regardless of the source (whether customary, conventional or other) or the content of the obligation.

Notes. *1. Article 16 embodies the substance and most of the language of article 16 as adopted on first reading, with the addition of elements from articles 17 and 19 (1). See paragraphs 5 to 34 above.*

2. Rather than the term "not in conformity with", the term "does not comply with" is preferred, on the ground that it is more comprehensive and more apt to cover breaches both of obligations of specific conduct and obligations of result. The term "under international law" has been added, following the suggestion of one Government, to indicate that the content of obligations is a systematic question under international law, and not only the result of a given primary rule taken in isolation. Further consideration may have to be given to whether the language of article 16 is consistent with the provisions of Part Five dealing with circumstances precluding wrongfulness.

~~*Article 17*~~

~~*Irrelevance of the origin of the international obligation breached*~~

Note. *Article 17 as adopted on first reading was not a distinct rule but rather an explanation of article 16. Its substance is included in article 16. See paragraphs 16 to 26 above.*

Article 18

Requirement that the international obligation be in force for the State

No act of a State shall be considered internationally wrongful unless it was performed, or continued to be performed, at a time when the obligation in question was in force for that State.

Notes. *1. Article 18 is a reformulated version of article 18 (1) as adopted on first reading. It states the basic principle of the intertemporal law as it applies to State responsibility. It is not concerned with ancillary questions such as jurisdiction to determine a breach, but only with the substantive question whether the obligation was in force at the relevant time. See paragraphs 38 to 44, above.*

2. Article 18 (2) dealt with the impact of peremptory norms on State responsibility. Those issues will be considered elsewhere, especially in relation to Chapter V of Part One, and Part Two. See paragraphs 45 to 51 above.

3. Article 18 (3) to (5) dealt with intertemporal issues associated with continuing composite and complex acts and have been transferred, as far as necessary, to the articles dealing with those concepts. See articles 24 and 25 below.

~~Article 19~~

~~International crimes and international delicts~~

Note. *The substance of article 19 (1) as adopted on first reading has been incorporated in article 16. Article 19, paragraphs (2) and (3), relating to the distinction between international crimes and international delicts, has been set aside pending further clarification. See paragraphs 27 to 33 above.*

[Article 20

Obligations of conduct and obligations of result

1. An international obligation requiring a State to adopt a particular course of conduct is breached if that State does not adopt that course of conduct.

2. An international obligation requiring a State to achieve, or prevent, a particular result by means of its own choice is breached if, by the means adopted, the State does not achieve, or prevent, that result.]

Notes. *1. This article replaces former articles 20 and 21, concerned with the distinction between obligations of conduct and of result. See paragraphs 52 to 91 above. Paragraph 2 treats obligations of prevention in the same way as obligations of result, thereby allowing the deletion of former article 23.*

2. Whether a particular obligation is one of conduct or result depends on the interpretation of the relevant primary rule. The statement of the distinction between such obligations does not exclude the possibility that a particular primary rule may give rise to obligations both of conduct and of result.

3. Article 20 is placed in square brackets at this stage because it may be thought to relate to the classification of primary rules, and because it is unclear what further consequences the distinction has within the framework of the draft articles. See paragraph 92 above.

~~Article 21~~

~~Breach of an international obligation requiring the achievement of a specified result~~

Note. *The substance of article 21 (1) has been incorporated in article 20 (2). Former article 21 (2) has been deleted, for reasons explained in the report. See paragraphs 69 to 76, above.*

~~Article 22~~

~~Exhaustion of local remedies~~

Note. *Article 22 has been reformulated and relocated as article 26* bis, *below.*

~~Article 23~~

~~Breach of an international obligation to prevent a given event~~

Note. *The breach of obligations of prevention, dealt with in former article 23, is now covered in article 20 (2), on the basis that obligations of prevention are a form of obligation* *of result. See paragraphs 81 to 87 above. The intertemporal aspect of obligations of prevention is addressed in article 24 (3).*

Article 24

Completed and continuing wrongful acts

1. The breach of an international obligation by an act of the State not having a continuing character occurs when that act is performed, even if its effects continue subsequently.

2. Subject to article 18, the breach of an international obligation by an act of the State having a continuing character extends from the time the act is first accomplished and continues over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and its continuance remains not in conformity with the international obligation.

Notes. *1. Article 24 combines the essential elements of former articles 24, 25 (1) and 26, together with article 18 (3). See paragraphs 93 to 115 above.*

2. The proposed articles avoid the use of the word "moment". So-called "instantaneous" acts are rarely momentary, and it will rarely be necessary to date them to a precise moment. The essential distinction is between continuing wrongful acts and acts which, though their effects may continue, were completed at, or by, a particular time past.

3. In accordance with paragraph (3), corresponding to former article 26, breach of an obligation of prevention will normally be a continuing wrongful act, unless the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), or the obligation in question has ceased. Both qualifications are intended to be covered by the phrase "and its continuance remains not in conformity with the international obligation".

Article 25

Breaches involving composite acts of a State

1. The breach of an international obligation by a composite act of the State (that is to say, a series of actions or omissions specified collectively as wrongful in the obligation concerned) occurs when that action or omission of the series occurs which, taken with its predecessors, is sufficient to constitute the composite act.

2. Subject to article 18, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act and for so long as such actions or omissions are repeated and remain not in conformity with the international obligation.

Notes. *1. Article 25 incorporates the substance of former articles 25 (2) and 18 (4), dealing with "composite acts". However, for the reasons explained in the report, the notion of composite acts is limited to composite acts defined as such in the relevant primary norm. See paragraphs 116 to 124, above.*

2. The proviso "Subject to article 18" is intended to cover the case where the relevant obligation was not in force at the beginning of the course of conduct involved in the composite acts but came into force thereafter. In such case the "first" of the acts or omissions in the series, for the purposes of State responsibility, is the first occurring after *the obligation came into force. But this need not prevent a court taking into account earlier acts or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches). See paragraph 121 above.*

3. The notion of "complex acts", formulated in articles 18 (5) and 25 (3), does not seem necessary, and these provisions are accordingly deleted. See paragraphs 125 to 131 above.

~~*Article 26*~~

~~*Moment and duration of the breach of an international obligation to prevent a given event*~~

Note. *Former article 26 has been incorporated as article 24 (3).*

Article 26 *bis*

Exhaustion of local remedies

These articles are without prejudice to the requirement that, in the case of an international obligation concerning the treatment to be accorded by a State to foreign nationals or corporations, those nationals or corporations should have exhausted any effective local remedies available to them in that State.

Notes. *1. Article 22 as adopted on first reading dealt with the exhaustion of local remedies in the framework of the concept of "complex acts". In all cases where the exhaustion of local remedies applied, the wrongful act was taken to include the failure of the local remedy. Although there may be cases where the wrongful act is constituted by the failure of the local remedy, there are other cases (e.g. torture) where this is not so, and for this and other reasons the notion of a "complex act" has been deleted. See paragraphs 136 to 148 above.*

2. Nonetheless it is desirable to make it clear in Chapter III that the occurrence of a breach of obligation is without prejudice to any requirement to exhaust local remedies that may exist under general international law. The more precise formulation of the local remedies rule can be left to be dealt by the Commission under the topic of diplomatic protection.

3. The placement of article 26 bis *may need to be reconsidered in the light of further work on the implementation of international responsibility, in Chapter III of Part Two.*

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Second report on State responsibility

by Mr. James Crawford, Special Rapporteur

Addendum

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II. Review of draft articles in Part One (continued)

B. Part One, Chapter IV: Implication of a State in the internationally wrongful act of another State

1. Introduction

(a) The scope of Chapter IV

157. In accordance with the general principle stated in article 3, State responsibility arises when conduct attributable to a State breaches an international obligation of that State. But there may be cases where conduct of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of Part One seeks to define the exceptional cases where this is so.

158. Three situations are covered in Chapter IV. Article 27 deals with what in national law would be termed "complicity", i.e. where one State provides aid or assistance to another State, thereby facilitating the commission of a wrongful act by the latter. Article 28 (1) deals with cases where one State is responsible for the internationally wrongful act of another State because it has assumed powers of direction or control over the latter, e.g., by treaty, or as a result of belligerent occupation of the latter's territory. Article 28 (2) deals with the extreme case where one State deliberately coerces another into committing an act which is or (but for the coercion) would be an internationally wrongful act on the part of the coerced State.[351] In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is (or but for the coercion, would be[352]) a breach of that State's international obligations. The "implication" of the second State in that breach arises from the special circumstance of its willing assistance in, its direction or control over, or its coercion of the conduct of the acting State. But there are also important differences between the three cases. Under article 27, the primary wrongdoer is the acting State and the assisting State has a supporting role. By contrast, in the case of coercion under article 28 (2), the coercing State is the *fons et origo* of the conduct, and the coerced State is its instrument. As formulated, article 28 (1) deals with a spectrum of cases, ranging from those where direction or control has actually been exercised by the dominant State, with the subordinate State merely following orders, to cases where the initiative has been taken by the latter and the responsibility of the dominant State derives merely from the failure to exercise a "power of direction or control".

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[351] For the *travaux* of article 27 see: Ago, Seventh Report, *Yearbook ... 1978*, vol. II, Part 1, pp. 52–60; *Yearbook ... 1978*, vol. I, pp. 232–237 (plenary debate); ibid., pp. 269–270 (report of Drafting Committee). For the *travaux* of article 28, see Ago, Eighth Report, *Yearbook ... 1979*, vol. II, Part 1, pp. 4–27; *Yearbook ... 1979*, vol. I, pp. 4–31 (plenary debate); ibid., pp. 169–174 (report of Drafting Committee). For discussions of the problem see M. L. Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Giuffrè, Milan, 1990); I. Brownlie, *State Responsibility. Part I* (1983) 189–192; J. Quigley, "Complicity in International Law: A New Direction in the Law of State Responsibility" (1986) 57 *British Year Book of International Law* 77; J. E. Noyes & B. D. Smith, "State Responsibility and the Principle of Joint and Several Liability" (1988) 13 *Yale Journal of International Law* 225; B. Graefrath, "Complicity in the Law of International Responsibility" (1996) 29 *Revue belge de droit international* 370 (which is especially useful). Earlier discussions of State "complicity" in the literature and the case law were concerned rather with problems of attribution or of the substantive standard of responsibility for the acts of private persons: see, e.g., J. L. Brierly, "The Theory of Implied State Complicity in International Claims" (1928) 9 *British Year Book of International Law* 42.

[352] This qualification is necessary because, if a State has really been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 31 and below, para. 202.

(b) Accessory responsibility and cognate concepts

159. In his Seventh Report, Mr. Ago settled on two cases to be dealt with in the chapter. The first was participation by one State in the wrongful act of another. The second was "indirect responsibility" based on the relationship between a State which directs or compels a wrongful act and the State which performs it.[353] No general justification was, however, offered for dealing with these two cases as compared with others that might be envisaged, and the commentary is largely silent on the point. But it is useful to place the specific situations currently dealt with in Chapter IV in the broader context of cooperation between several States in the commission of internationally wrongful conduct. At least the following might be envisaged:

(a) *Joint conduct.* State A combines with State B in carrying out together an internationally wrongful act. For example, if two States combine to carry out a certain operation, they may be described as acting jointly in respect of the operation as a whole, although terms such as "joint", "joint and several", "solidary", derived from national legal systems, must be used with care;

(b) *Action via a common organ.* States A and B act together through a common organ in performing an act. In such a case,[354] the organ is at the same time an organ of both States, in accordance with article 5 of the draft articles, and the conduct is attributable to both;

(c) *Agency.* State A acts on behalf of or as agent for State B in carrying out internationally wrongful conduct, but nonetheless retains its own role and responsibility for the conduct of its own organs[355]. For example, State B may request State A to perform certain acts on its behalf in the exercise of the right of collective self-defence. If the acts in question exceed what is permitted by Article 51 of the Charter, it may be that both the requesting and the acting State are responsible;[356]

(d) *Independently wrongful conduct involving another State.* State A engages in conduct, contrary to its own international obligations, in a situation where another State is involved, and the conduct of the other State is relevant or even decisive in assessing whether State A has breached its own international obligations. For example, in *Soering v. United Kingdom*, the European Court of Human Rights held that the United Kingdom was responsible for extraditing a person to a State not a party to the European Convention, where he would suffer inhuman or degrading treatment or punishment.[357] Thus a State may be internationally responsible for its own conduct in allowing someone to be subjected to harmful treatment, even if the harmful treatment is inflicted on its own account by another State.[358] Or a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct;[359]

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[353] Ago, Seventh Report, *Yearbook ... 1978*, vol. II, Part One, pp. 52–53 (paras. 52–53).

[354] Referred to by Ago, Seventh Report (1978) p. 54 (para. 58).

[355] If the relevant organ of State A is "placed at the disposal" of State B, in the sense provided for in article 9 of the draft articles, then only State B will be responsible for the act in question. See First Report, A/CN.4/490/Add.5, para.233. But there are many cases where the organs of State A retain some control over the acts they perform as agent for another State, and are not merely acting ministerially. This was true, for example, of Australia in the *Case concerning Certain Phosphate Lands in Nauru, I.C.J. Reports 1992*, p.240.

[356] Cf. *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) I.C.J. Reports 1986*, p. 14; *Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras) I.C.J. Reports 1988*, p. 69.

[357] *Soering Case*, ECHR Ser. A, vol. 161 (1989), at pp. 33–36.

[358] The *Soering* principle has been applied by the Court in subsequent cases, although with some care: see e.g., *Cruz Varas v. Sweden*, ECHR Ser. A, No. 201 (1991), *Vilvarajah v. United Kingdom*, ECHR Ser. A, No. 215 (1991).

(e) *Voluntary assistance in the commission of a wrongful act.* State A in some way assists State B in carrying out conduct which violates State B's international obligations, for example by knowingly providing an essential facility, or by financing the activity in question. This is the situation addressed by article 27. It differs from the *Soering*-type situation in that here the reason why State A's conduct is wrongful is its relationship to the wrongful conduct of State B;[360]

(f) *Incitement of wrongful conduct.* State A incites or encourages State B to carry out internationally wrongful conduct, but without materially assisting it to do so;[361]

(g) *Direction, compulsion or coercion.* State A compels or coerces State B to carry out internationally wrongful conduct, or State B acts under the direction and control of State A in carrying out such conduct. These cases are addressed by article 28. So too is the case of a failure to prevent wrongful conduct by State B in a field in which State A had the power to direct or control State B;

(h) *Assistance given after the wrongful conduct.* State A assists State B in escaping responsibility for internationally wrongful conduct, or in maintaining the benefits of such conduct, but without having had any involvement in the wrongful conduct itself. This is known as an "accessory after the fact" in common-law terminology;

(i) *Conduct of several States separately causing aspects of the same harm or injury.* A further possibility is that parallel wrongful conduct of several States can contribute to causing loss which, if only one of those States had acted, might not have occurred. For example, several States might contribute to polluting a river by pollutants which are much more significant, collectively and in combination, than they would have been if only one of those States had engaged in the conduct.

160. These situations are not mutually exclusive but can combine in different ways. For example, the *Case concerning Certain Phosphate Lands in Nauru* concerned the responsibility of Australia towards Nauru for acts performed by it on the "joint behalf" of the three States (Australia, New Zealand, United Kingdom) which together constituted the Administering Authority for the Trust Territory of Nauru.[362] This was both a case of "joint" conduct (situation (a) above) and a case where in terms of day-to-day administration one of the States acted on behalf of the other two States as well as on its own behalf (situation (c) above).

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[359] Thus the basis of Albania's responsibility in the *Corfu Channel* case was its failure to warn of the presence of mines in its waters which had been laid by a third State. See *I.C.J. Reports 1949*, p. 4.

[360] In *Soering*, the Court stressed that the conditions in the receiving country were considered as a question of fact. It said: "[T]here is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. Insofar as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment": ECHR Ser. A, vol. 161 (1989), at p. 36. Indeed it may be that, so far as the receiving State is concerned, the treatment in question is internationally lawful.

[361] See Ago, Seventh Report (1978), pp. 54–56 (paras. 61–65), arguing against mere incitement as a basis for responsibility. There are specific treaty obligations on States to prohibit incitement in certain contexts (e.g. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. III (e); International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, art. 4 (incitement to racial hatred or discrimination)).

[362] *I.C.J. Reports ...*, p. 240.

161. A special kind of "collective" conduct occurs where several States cooperate in establishing and maintaining an international organization to act on their behalf or, conversely, where one or more States acts on behalf of an international organization for some purpose of the organization. This raises questions of the extent to which the States concerned may be responsible either for the acts of the organization, or for the acts of individual member States carried out with its authority. For reasons explained above, however, the draft articles should not deal with cases of the responsibility of international organizations, or of member States for the acts of international organizations (including what may be termed "secondary responsibility").[363] Thus it is not necessary to consider such questions as who is responsible for the performance of mixed agreements of the European Union, where both the European Community and its member States are parties to the agreement and issues of the division of competence arise.[364]

162. Setting to one side issues of the responsibility of or for the acts of international organizations, the question is which of the cases surveyed above should be dealt with in the draft articles, and specifically in Chapter IV. According to articles 1 and 3, each State is responsible for its own conduct, i.e., for conduct, attributable to it under Chapter II, which is in breach of its own international obligations, the element of breach being specified in Chapter III. The question is then to identify, from the different forms of joint or concerted actions of several States identified in paragraph 159 above, those which are not adequately resolved by this general principle. It seems that situations (a), (b), (c), (d) and (i) do not raise any particular problems for the purposes of Part One of the Draft articles, although they may raise issues under Part Two as to the extent of reparation which each State is to bear. That leaves situations (e), (f), (g) and (h). Chapter IV proceeds on the basis that incitement of wrongful conduct (situation (f)) and assistance to a State after the conduct in question has been committed (situation (h)) are not generally wrongful in international law, or at any rate do not call for treatment in Part One.

163. It is, however, necessary to consider the situations actually covered by articles 27 and 28 before asking whether any additional cases of collective, ancillary or inchoate responsibility should be dealt with, in Chapter IV or elsewhere.[365]

(c) Chapter IV as a statement of secondary rules?

164. One obvious feature of article 27, and perhaps also of article 28, is that they specify that certain conduct is internationally wrongful. Article 27 says that aid or assistance "itself constitutes an internationally wrongful act", while article 28 says that the international responsibility of one State is entailed by the wrongdoing of another in certain cases. Yet the draft articles are based upon a distinction between primary and secondary rules, and it is not their function "to define a rule and the content of the obligation it imposes".[366]

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[363] See First Report, A/CN.4/490/Add. 5, paras. 234, 262, and draft article A as proposed by the Drafting Committee in 1998. In the *Phosphate Lands case* it was agreed that the "Administering Authority" for Nauru was not a separate legal person, i.e., it was not an international organization distinct from the three participating States: see *I.C.J. Reports 1992*, p. 240, at p. 258.

[364] See I. MacLeod, I. D. Hendry and S. Hyett, *The External Relations of the European Communities* (Clarendon Press, Oxford, 1996), pp. 158–160; C. Tomuschat, "Liability for Mixed Agreements", in D. O'Keeffe and H. G. Schermers (eds.), *Mixed Agreements* (Kluwer, Deventer, 1983), pp. 125–132. For judicial authorities, see opinion of Jacobs A-G in *Case C-316/91. European Parliament v. Council of the European Union* [1994] ECRI-625, esp. paras. 69 et seq.; opinion of Tesauro A-G in *Case C-53/96. Hermes International v. FHT Marketing Choice BV* [1998] ECRI-3603, paras. 14, 20.

[365] See para. 211 below.

[366] To use the words of Special Rapporteur Ago, *Yearbook ... 1970*, vol. II (Part Two), p. 306, para. 66 (c), cited in First Report, A/CN.4/490, para. 13. For a discussion of the distinction, see ibid., paras. 12–18.

Article 27, at least, seems to do that, even though it does so by reference to the wrongful act by another State.

165. This aspect of Chapter IV is neither stressed nor excused in the commentary, which says only that Chapter IV is concerned with cases where one State is implicated in the internationally wrongful conduct of another.[367] But it may be justified in that responsibility under Chapter IV is, in a sense, derivative.[368] In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the "general part" of the law of civil or criminal obligations, as the case may be. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in Chapter II. In certain circumstances, it may be justified to attribute the wrongfulness of State A's conduct to State B, which is implicated in that conduct because of assistance given or direction or coercion exercised. Depending upon the scope of the responsibility defined by Chapter IV, it is thus possible to defend articles 27 and 28 as falling within the scope of a draft concerned with the secondary rules of State responsibility. Care is needed to ensure that the articles do not go beyond the scope of "implication", turning into substantive and possibly controversial primary rules. Whether they do so, however, depends upon their content rather than their classification.

2. Review of specific articles

(a) Article 27: Aid or assistance by a State to another State for the commission of an internationally wrongful act

166. Article 27 provides as follows:

> "Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation."

167. Literally interpreted, article 27 posits a rather extensive principle of responsibility of one State for the acts of another. It treats as wrongful any "aid or assistance ... rendered for the commission of an internationally wrongful act" carried out by the second State. The "mental element" of assistance is not specified in the article: what degree of awareness is required that the assisted State is engaging in an internationally wrongful act? Nor is any distinction made between degrees or types of "aid or assistance", which might vary from the indispensable to the incidental.

168. The commentary to article 27 clarifies these matters considerably. First it distinguishes between participation in the wrongful act of another State and cases where "a State is or becomes a co-perpetrator of an internationally wrongful act".[369] Then it distinguishes between cases of advice, encouragement or incitement, on the one hand, and cases of actual assistance. "In the international legal order ... it is more than doubtful that the mere incitement by one State of another to commit a wrongful act is in itself an internationally wrongful act."[370] Incitement is thus to be distinguished from complicity, especially in

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[367] Commentary to Chapter IV, para. (1).

[368] Cf. the term "responsabilité dérivée" as used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco*, UNRIAA, vol. 2, p. 615 (1924), at p. 648.

[369] Commentary to article 27, para. (2).

[370] Ibid., paras. (3), (4), citing the conclusions of the United States-French Commissioners of 1836, refusing to hold France responsible for acts of Denmark done under its influence and incitement but nonetheless independently. See Moore, 5 *International Arbitrations* ... (1898), pp. 4473 *et seq.*

international relations. For different reasons, cases of direction and coercion are also distinguished from complicity, and are dealt with in article 28. Thus article 27 is concerned with the case where the one State acts alone, and is primarily responsible, but another State materially assists it in the commission of a wrongful act.[371]

169. The commentary notes that certain forms of assistance are independently prohibited by international law. For example, the General Assembly's Definition of Aggression defines as aggression, *inter alia*, "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State".[372] But according to the commentary, aiding and assisting the wrongful act of another State is itself wrongful, even though this is not expressly stated in any primary rule. Indeed, this is the case, irrespective of whether the principal act is a crime or a delict,[373] or of whether the aid or assistance itself constitutes a wrongful act.[374] It is sufficient that the assisting State has "an intent to collaborate in the execution of" a wrongful act. This is satisfied, for example, where the assisting State has "knowledge of the specific purpose for which the State receiving certain supplies intends to use them".[375] Most of the examples of State practice given in the commentary involve assistance by one State in a use of armed force by another, e.g., through allowing overflight or landing rights in the course of a military operation by another State which is said to constitute aggression or intervention.[376] It should be noted that all of the examples given involve the breaches of obligations arising under primary rules by which the assisting State was itself bound.

170. Thus the Commission concluded, partly as a matter of progressive development, that a general rule prohibiting complicity or participation in the wrongful act of another State should be included in Part One.[377] Such participation was not necessarily a wrong of the same gravity as the conduct assisted. Its gravity would depend, *inter alia*, on "the extent and seriousness of the aid or assistance actually furnished to the author of the principal wrongful act", and this was a further reason for distinguishing it from the principal act.[378] But for article 27 to apply, the assistance given had to be material, and it had to be given "with *intent* to facilitate the commission" of the wrongful act by the other State.[379] Moreover, the assisted State must actually commit a wrongful act, so that the illegality of the conduct of the assisting State was strictly dependent on that of the assisted State.[380]

Comments of Governments on article 27

171. Germany doubts whether existing international law goes as far as article 27, and calls for more precision both of the term "rendered for the commission of" and of the necessary element of intent.[381] The United States in substance agrees. [382]Switzerland argues that

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[371] Commentary to article 27, para. (11).

[372] General Assembly resolution 3314 (XXIX), annex, para. 3 (f), cited in the commentary to article 27, para. (12).

[373] Commentary to article 27, para. (13).

[374] Ibid., para. (14).

[375] Ibid.

[376] Ibid.

[377] Ibid., para. (15).

[378] Ibid.

[379] Ibid., para. (16) (emphasis in original).

[380] Ibid., para. (19).

[381] A/CN.4/488, pp. 75–76.

[382] Ibid., p.77.

article 27 "has no basis in positive law" and should be deleted.[383] In an earlier comment, Sweden too questioned the breadth of article 27 as formulated, and queried whether it was not a primary rule.[384]

172. The United Kingdom, by contrast, supports the "basic principle" but raises a series of drafting points, which nonetheless raise issues of principle about article 27 as such. For the United Kingdom, the fundamental issue is the need to distinguish between cases where the act of the assisting State is independently wrongful and those where it is not. If it is independently wrongful, there is no need for article 27. If it is not, the principle of responsibility needs to be clearly expressed.[385] Japan likewise is supportive of article 27 but calls for a clearer definition of the principle.[386] In an earlier comment, Mali noted that various factors had to be taken into account in determining whether aid had been rendered "for the commission of an internationally wrongful act", but it nonetheless strongly supported the article.[387]

Article 27 as a case of derived responsibility: two preliminary issues

173. Article 27 provides for derived responsibility in two distinct ways. First, the assisting State is only responsible if the assisted State has actually committed an internationally wrongful act. As the commentary makes clear, the responsibility of the assisting State only arises if and when the assisted State carries out the wrongful act. Secondly, the assisting State is only responsible if it is established that the assistance was "rendered for the commission of an internationally wrongful act". What is required is a specific intent to assist in the commission of the wrongful act by the assisted State. This raises questions both of definition and of principle, but two preliminary difficulties should first be mentioned.

174. One is the procedural difficulty of establishing the responsibility of the assisting State in judicial proceedings in the absence of the assisted State. The International Court has repeatedly affirmed that it cannot decide on the international responsibility of State A if, in order to do so, "it would have to rule, as a prerequisite, on the lawfulness" of the conduct of State B, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.[388] By definition that principle will apply to cases under article 27, since it is of the essence of the responsibility of the assisting State that the assisted State has committed an internationally wrongful act. The wrongfulness of the assistance given by the former is dependent upon the wrongfulness of the conduct of the latter (as well as upon the former's awareness of its wrongfulness). But although this may present practical difficulties in some cases in establishing the responsibility of the assisting State, it is not a good reason for rejecting article 27. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings. Diplomatic protests have been made in cases of wrongful assistance given to another State, and this is proper, since States are entitled to assert complicity in the wrongful conduct of another State even though courts may be incompetent to rule on the charge in the absence of that other State. In addition, the principle does not always apply even in judicial proceedings. For example, it does not apply

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[383] Ibid., p. 76.

[384] *Yearbook ... 1981*, vol. II (part 1) p. 77.

[385] Ibid., pp. 76–77.

[386] A/CN.4/492, p. 11.

[387] *Yearbook ... 1980*, vol. II (part 1) p. 101.

[388] *Case concerning East Timor, I.C.J. Reports 1995* p. 90 at p. 105 (para. 35); see also *Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954*, p. 19 at p. 32; *Certain Phosphate Lands in Nauru, I.C.J. Reports 1992*, p. 240, at p. 261 (para. 55).

in cases where the responsibility of the assisted State has already been established by a competent international body.[389]

175. A second difficulty relates to the development of specific substantive rules prohibiting one State from providing assistance in the commission of certain wrongful acts by other States, or even requiring third States to prevent or repress such acts. Paragraph 3 (f) of the General Assembly's definition of aggression has been referred to above, and there are other examples.[390] These texts do not rely on any general principle of derived responsibility. Do they, by implication, deny the existence of any general principle?[391] It does not seem so. Specific rules generated at different times prohibiting assistance to wrongdoing States may show the importance of preventing assistance in those contexts, but it goes too far to infer from them, *a contrario*, the non-existence of any general rule. It was not the function of the Definition of Aggression to deal with the general law of State responsibility, and to have remained silent on the point in formulating the text of article 3 would not have served the purpose of defining aggression. As to other treaty provisions (e.g., article 2, paragraph 5 of the Charter of the United Nations), again these have a specific rationale which goes well beyond the scope and purpose of article 27 of the draft articles.

176. For these reasons, neither the procedural difficulty presented by the *Monetary Gold* principle nor the existence of specific primary rules overlapping with article 27 in certain fields provides grounds for rejecting the general principle.

177. A much more serious objection, however, relates to the scope of the principle. According to the very cryptic formulation of article 27, the aid or assistance must be shown to have been "rendered *for* the commission of an internationally wrongful act", but the one word "for" raises a number of questions. When is assistance rendered "for" such a purpose? Assistance can range from the indispensable to the incidental: how significant must it be in achieving the purpose? Must the assisting State be fully aware not only of the purpose but also of its illegality? Beyond these questions of formulation and definition lie more basic issues. In particular, does it matter that the assisting State is not itself bound by the rule whose breach it helps to achieve? If not, can such assistance ever be justified? The range of examples given in the commentary to article 27 is relatively narrow, and is limited to breaches of fundamental rules such as Article 2, paragraph 4, of the Charter of the United Nations. But article 27 itself is not so limited. Is a general rule, applicable equally to bilateral treaties and to peremptory norms, desirable? Does it have a place in the draft articles?

The problem of intention or knowledge of wrongfulness

178. It is clear that to impose on the assisting State a standard of strict responsibility is too harsh. A State providing material or financial aid to another should not be required to take the risk that the aid will be used to carry out an internationally wrongful act. In any event, it can be very difficult to show that particular resources were so used — especially financial

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[389] In the *Case concerning East Timor*, Portugal argued that the legal position of Indonesia had already been authoritatively established by earlier resolutions of the Security Council and the General Assembly. The Court denied that the resolutions went so far: *I.C.J. Reports 1995*, p. 90, at p. 104 (para. 32). By implication, a clear and binding resolution of a competent organ might avoid the *Monetary Gold* principle: cf. *Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 16, at p. 54 (para. 117).

[390] See para. 169 above. See also Charter of the United Nations, Article 2 (5) ("All Members shall ... refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action").

[391] See the comments of Switzerland and Germany, para. 171 above.

resources or information. The commentary to article 27 stresses that the responsible organs of the assisting State must be aware that the assistance will be used for an unlawful purpose and must intend that result. In other words, the assistance must be given:

> "with the specific object of facilitating the commission of the principal internationally wrongful act in question ... [I]t is not sufficient that aid or assistance provided without such intention could be used by the recipient State for unlawful purposes, or that the State providing aid or assistance should be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act. Nor is it sufficient that this intention be 'presumed'; as the article emphasizes, it must be 'established'."[392]

The explanation is helpful, but it is clear that, if article 27 is to be retained, these requirements should be expressed in the text of article 27 and not only in the commentary.[393] Given the nature of inter-State relations and the great diversity of situations which may be involved,[394] article 27 should cover only those cases where the assistance is clearly and unequivocally connected to the subsequent wrongful act. So far as the element of "intention" is concerned, this means that the relevant State organ(s) must have been aware that the conduct in question was planned, and must further have intended, by the assistance given, to facilitate its occurrence.

179. There is a further question as to intention. Must the assisting State not only be aware that the conduct will occur, but also know of its internationally wrongful character? Does "ignorance of the law" by the State officials who give the aid or assistance excuse the assisting State? Ignorance of international law is not generally an excuse for wrongful conduct by States. Is it, exceptionally, an excuse in the context of article 27? If so, does the assisting State have a duty of reasonable inquiry as to the illegality, or is it sufficient to exonerate it that the relevant officials turned a blind eye to the illegality? These are difficult questions,[395] and they are, moreover, substantive questions. It is proposed to return to them below.[396]

The nexus between assistance and wrongful act

180. A second issue, which is not resolved by any definition of intention, relates to the link required between the assistance and the wrongful act. A State might intend to assist in a wrongful act, fully aware of the circumstances, yet its assistance might be really irrelevant, amounting to little more than incitement or encouragement (which article 27 does not seek to cover). On the other hand, the assistance might be vital, as with the provision of a forward military base or refuelling facilities to aircraft otherwise out of range of their target. According to the commentary, "the aid or assistance must have the effect of making it *materially* easier for the State receiving the aid or assistance in question to commit an internationally wrongful act".[397] In principle this must be correct. To require that the aid should have been an indispensable prerequisite to the wrongdoing would invite speculation

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[392] Commentary to article 27, para. (18).

[393] See the comments of various Governments to this effect, paras. 171–172 above.

[394] E.g., the use of military bases or of territory generally, overflight, military procurement, economic aid, training of personnel, provision of confidential information, etc..

[395] Despite Article 102 (1) of the Charter, one State cannot be expected to be aware of the bilateral treaty obligations of another. If notice of wrongfulness is required, a formula analogous to article 46 of the Vienna Convention on the Law of Treaties would be appropriate.

[396] See paras. 184–186 below.

[397] Commentary to article 27, para. (17) (emphasis in original); cf. ibid., para. (18).

as to other contingencies, and might create loopholes to the application of the rule.[398] But the term "materially" is problematic, if only because of its connection with the notion of "material breach" under article 60 of the Vienna Convention on the Law of Treaties, which is defined as "the violation of a provision essential to the accomplishment" of the treaty. If the aid or assistance does not have to be essential to the accomplishment of the wrongful act, the word "materially" should be avoided. On balance it is sufficient to use the term "aids or assists", and to explain it in this sense in the commentary.

Must the assisting State be bound by the primary rule in question?

181. Even assuming a satisfactory formulation of article 27 along the lines explained in the commentary, substantive issues remain. As currently formulated, article 27 would cover assistance by State A in the breach of an obligation by State B to which State A is not privy. As article 17 makes clear, the draft articles cover breaches of treaties as well as of obligations under other sources of international law. They cover breaches of obligations under unilateral commitments or bilateral treaties as well as obligations *erga omnes*.[399] Yet it is far from clear that the same rule prohibiting assistance should apply to these different cases.[400] Take the case of a bilateral treaty between State B and State C under which the two States agree not to export certain materials or technology to, or not to trade with, State A. In the language of national trade practices law, this is a secondary boycott. State A, the target State, is of course not bound by the treaty.[401] Why should it be legally responsible if, knowing of the treaty, it assists State C in breaching? Article 27 could thereby become a vehicle by which the effect of well-publicized bilateral obligations was extended to the rest of the world. The position is surely different if the assisting State *is* bound by the primary rule, for example, if a party to a nuclear non-proliferation treaty assists another party in acquiring weapons from a third State in breach of the treaty. This suggests that article 27 should be limited to obligations which are binding upon or opposable to the assisting State.

182. One possible argument for the broader formulation of article 27 derives from analogies with national law. Under many national legal systems it is a civil wrong knowingly to assist another person in violating the latter's contractual obligations.[402] No doubt analogies with national law can be misleading, but the existence of a general principle of liability for inducing breach of contract could provide support for the breadth of article 27. The annex to the present report (see A/CN.4/498/Add.3) contains a brief comparative survey of the legal position with respect to inducing breach of contract in some national legal systems.

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[398] To similar effect, see Quigley, loc. cit. (note 297 above), at pp. 121–122.

[399] See paras. 17, 20–21, 26 above.

[400] As noted by Sweden in an earlier comment: *Yearbook … 1981*, vol. II (Part One), p. 77.

[401] See Vienna Convention on the Law of Treaties, 1969, articles 34–35.

[402] The issue is not discussed in the commentary, or indeed in the literature generally. C. L. Bouvé, "Russia's Liability in Tort for Persia's Breach of Contract", *American Journal of International Law*, 6 (1912), p. 383 discusses a case of responsibility of a State for inducing, by coercion, a breach of a State's contract with a national of a third State, which is a different issue. Sir Hersch Lauterpacht relied on municipal analogies in arguing for the invalidity of a later treaty conflicting with an earlier one: see "The Covenant as the 'Higher Law'" (1936) 17 *British Year Book of International Law* 54; "Contracts to Break a Contract" in E. Lauterpacht (ed.), *International Law, being the Collected Papers of Hersch Lauterpacht* (Cambridge, 1978), p. 341, at pp. 374–375. *A fortiori* he would have supported the view that inducing breach of a bilateral treaty is a delict. His position as to the invalidity of conflicting treaties was, however, not accepted in the Vienna Convention on the Law of Treaties. Instead questions of State responsibility arise for the State with conflicting obligations: see paragraph 9 above, and S. Rosenne, *Breach of Treaty* (Grotius, Cambridge, 1985), pp. 87–89, 93.

The survey suggests that, while there is some comparative support for a general principle creating liability for inducing breach of an agreement with a third party, this support is heavily qualified. First of all, the principle is not recognized in some legal systems (e.g., those based on Islamic law), and only to a very limited extent by others (e.g., German law). In those systems where it is recognized in principle (e.g., French law, the common law), it is subject to important qualifications. In particular, the contract concerned must be lawful, the interference with it must be intentional and there must be no independent justification for the interference.

183. Moreover, even if the support to be drawn from domestic analogies such as inducing breach of contract were less equivocal than it is, there are difficulties in applying such a general principle to international relations. Treaties reflect the particular policies of the States entering into them, and international law has a strict doctrine of privity in relation to treaties. Moreover, treaties have proliferated, and many obligations to provide finance, materials or technology are incorporated in treaties. National legal systems have more rigorous controls on the legality of contracts than international law currently has for treaties,[403] and there are ways under national law by which third parties can challenge the legality of contracts adversely affecting them which do not yet exist for treaties.[404]

184. All these considerations suggest that the principle in article 27 cannot be applied to bilateral obligations in an unqualified form. Take a case where finance or goods are to be provided pursuant to a treaty by State A to State B, and State A realizes that to comply with the treaty will produce a breach of State B's obligation to State C. Under international law both treaties are presumably valid, although this is without prejudice to the international responsibility of State B. In such circumstances, why should State A be the judge of State B's compliance? If State B insists upon performance of its treaty with State A, is State A entitled to refuse? Yet under article 27, it would appear that if State A knowingly provides the assistance, it is responsible to State C.[405] Or take a case where a few States, the only producers of a particular strategic good or raw material, enter into a treaty to limit sales and increase prices. Why should purchasers, who are not bound by that treaty, be potentially liable for inducing one of the treaty parties to sell to them at a reduced price?

Conclusions on article 27

185. There is a case for the deletion of article 27, on the ground that it states a primary rule and thus falls outside the scope of the draft articles.[406] Certainly, if the breadth of the article is to be maintained, it would be necessary to address the questions identified above, for

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[403] E.g., in the context of competition law, *ultra vires* contracts of public authorities, contracts offending public policy, etc. For a comparative review see A. von Mehren, "Contracts in General", in: *International Encyclopedia of Comparative Law*, vol. VII, ch. 1, pp. 29–40; P. D. V. Marsh, *Comparative Contract Law. England, France, Germany* (Gower, Aldershot, 1993) pp. 87, 91, 99–100.

[404] Under articles 65 and 66 of the Vienna Convention on the Law of Treaties, the procedure for invoking *jus cogens* to invalidate a treaty is apparently available only to the parties to the treaty in question, not to affected third States. In the *Case concerning East Timor, I.C.J. Reports 1995*, p. 90, Portugal did not purport to challenge the validity of the 1989 Treaty. See paras. 9 and 174 above.

[405] It might be argued that State A's intention here is not to injure State C, but rather to comply with its obligations to State B. The fact remains that State A knows that its assistance will produce a breach of State B's obligation. Refined judgements of the "intention" of States, based on casuistical doctrines such as "double effect", are not a very secure basis for State responsibility. A broad rule such as that specified in article 27 could only work satisfactorily if it were open to the assisting State to justify its assistance, e.g., on the ground of an equally valid moral or legal duty. But to enact a principle of justification would plainly involve legislating in the field of the primary rules of responsibility.

[406] Cf. Switzerland's comments, para. 171 above.

example, as to the awareness of the assisting State of the legal obligations of the assisted State, or as to the existence of possible justifications for action in cases where there are conflicting obligations. Whatever view may be taken on these issues, it seems clear that they are substantive ones, which fall outside the scope of the secondary rules of State responsibility.

186. On the other hand, article 27 may be justified in the framework of Chapter IV if it is limited to aid or assistance in the breach of obligations by which the assisting State is itself bound. It may be that the assisting State should not be required to judge the legal obligations of the assisted State, but it has notice of and must take responsibility for its own legal obligations. For State A deliberately to procure the breach by State B of an obligation by which both States are bound cannot be justified; a State cannot do by another what it cannot do by itself. Seen in this more limited light, the inclusion of article 27 in the draft articles can be justified, since it deals with the implication of one State in the commission of a wrongful act by another — that is to say, an act which is wrongful so far as both States are concerned.[407] For all these reasons, article 27 should be retained, but it should be limited to cases where the aid or assistance is given by the assisting State with knowledge of the circumstances of the internationally wrongful act; the aid or assistance materially advances the commission of that act, and the act in question would have been internationally wrongful if committed by the assisting State itself.[408]

(b) Article 28: Responsibility of a State for an internationally wrongful act of another State

187. Article 28 provides as follows:

> "1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.
>
> "2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.
>
> "3. Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other provisions of the present articles, of the State which has committed the internationally wrongful act."

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[407] This conclusion is consistent with criticisms in the literature of the breadth of article 27, although the specific solution proposed is slightly different. Thus Padeletti, op. cit. (see note 297 above) would limit article 27 to obligations *erga omnes*, in view of their importance and of the fact that all the limited practice relates to such obligations. But other multilateral obligations are also important; why should parties to a multilateral treaty be able to assist each other to do what neither could lawfully do alone? Graefrath, op. cit. (see note 297 above) would also limit complicity to wrongful acts which affect the international community as a whole, and would create a presumption of intent to assist. The proposal in the text retains the element of intent, which can be demonstrated by proof of rendering aid or assistance with knowledge of the circumstances. Quigley, op. cit. (see note 297 above) generally supports article 27 as drafted, but advocates imposing upon the assisting State a duty of care to ensure that aid is not used for illegal means in case of doubt. He fails, however, to address the problem of obligations by which the assisting State is not bound.

[408] For the proposed text of article 27, see para. 212 below.

Comments of Governments on article 28

188. Switzerland points to the need for coordination between this provision and the provisions of Chapter V dealing with coercion or duress.[409] France notes that paragraph 1 reflects "a historically dated situation": in paragraph 2, the term "coercion" is too wide, and should be limited to coercion contrary to international law.[410] In an earlier comment, Mongolia doubted "the appropriateness of the present drafting" of article 28, and especially the unqualified use of the term "coercion".[411]

189. Article 28 deals with two distinct cases, one involving situations of dependency (e.g., international protectorates or belligerent occupation), and one involving cases of coercion of one State by another. It is necessary to deal with them separately.

Article 28 (1): Responsibility arising from actual or potential direction or control

190. The commentary to paragraph 1 points to three different cases where there may be a relationship of dependency between one State and another, such as to warrant treating the dominant State as internationally responsible for the wrongful acts of the dependent State. These are: (a) international dependency relationships, especially "suzerainty" and international protectorate; (b) relationships between a federal State and States members of the federation which have retained their own international personality; (c) relationships between an occupying State and an occupied State in cases of territorial occupation.[412] It contrasts these with situations of pure representation, where one State has assumed, even on an exclusive basis, responsibility for representing another State in international relations, but without any power of direction or control over the decision-making process of the dependent State.[413]

191. As to cases of international dependency (such as international protectorates), the commentary cites the decision of an arbitral tribunal in the *Robert E. Brown* case in support of the proposition that "indirect responsibility ... should be attributed to a State for an internationally wrongful act committed by another State which is linked to it by a relationship of dependence, when the wrongful act complained of has been committed in an area of activity in respect of which the dominant State has effective power of control over the dependent State, and in that case only".[414] Such situations are admittedly dated, but according to the commentary this is no reason not to include such a well-established rule in the draft articles.[415]

192. As to relationships between a federal State and its component units possessing separate international personality, the commentary applies similar reasoning to conclude that "the federal State should be responsible for internationally wrongful acts attributable to the member State if they were committed in a sphere of activity subject to the control or direction of the federal State", but not otherwise.[416]

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[409] A/CN.4/488, p. 78.

[410] Ibid.

[411] *Yearbook ... 1981*, vol. II (Part One), p. 76.

[412] Commentary to article 28, para. (10).

[413] Ibid., paras. (5)–(8), distinguishing the decision of Arbitrator Huber in *British Claims in the Spanish Zone of Morocco*, UNRIAA, vol. 2, p. 615 (1924), at p. 648, on the basis that the relationship between Spain and Morocco was not one of mere representation.

[414] Commentary to article 28, para. (14), citing *Robert E. Brown (United States) v. Britain*, UNRIAA, vol. 6, p. 120 (1923) at pp. 130–131.

[415] Ibid., paras. (15)–(17).

[416] Ibid., para. (18).

193. Finally, as to belligerent occupation, the same rule is again affirmed, relying on earlier diplomatic precedents as well as on the decision of the Franco-Italian Conciliation Commission in the *Duc de Guise* case.[417] In such cases the occupying State is responsible for the acts of the occupied State provided "(a) that the occupied State continued to exist as a separate subject of international law; and (b) that the internationally wrongful act was committed by the occupied State in an area of activity in which that State was subject to the direction or control of the occupying State". This is so, irrespective of the legality of the occupation.[418]

194. The general rule in article 28 (1) is formulated on the basis of these three situations. According to article 28 (3), the responsibility of the dominant State is without prejudice to the responsibility of the dependent State, although the wrongfulness of the latter's conduct might be attenuated or even precluded under Chapter V, e.g., because of *force majeure*.

The proper scope of paragraph (1) in the framework of the draft articles

195. A wide range of dependency relationships is discussed in the commentary. But it must be stressed that Chapter IV is only concerned with the responsibility of one State for the conduct of another State, and this has implications for the scope of article 28 (1).

- *Exclusion of dependent territories or component units of federal States which are not themselves States.* In most relationships of dependency between one territory and another, the dependent territory, even if it possesses some international personality, is not a State. This is equally true of existing federal States. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right (and not by delegation from the federal State), the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other States. The normal principles specified in articles 5 and 10 of the draft articles apply,[419] and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal Constitution.[420]
- *Disappearance of older cases of international dependency.* A further limitation on the scope of article 28 results from developments in international relations since the 1970s. Almost without exception, the older international dependency relationships have been terminated (as with the British protected States in the Arabian peninsula). Those that remain have mostly been reformulated so as to reduce or eliminate areas of uncertainty or dependency.[421] The links between, for example, Italy and San Marino, Switzerland and Liechtenstein or New Zealand and Western Samoa are based on representation, and do not involve any legal right to direction or control on the part of the representing State. As the commentary to article 28 emphasizes, in pure cases of representation the represented entity remains responsible for its own international

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[417] See (1951) 18 ILR p. 426.

[418] Commentary to article 28, para. (24).

[419] See First Report, A/CN.4/Add.5, paras. 256–262.

[420] As the International Court had occasion to emphasize in the *La Grand case (Germany v. United States of America)*, Order of 5 March 1999, para. 28. See also B. R. Opeskin, "International Law and Federal States", in B. R. Opeskin and D. R. Rothwell (eds.), *International Law and Australian Federalism* (Melbourne, Melbourne University Press, 1997), p. 1.

[421] See J. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge, Cambridge University Press, 1996) for details in relation to the European micro-States, which are now all Members of the United Nations.

obligations, even though diplomatic communications may be channelled through another State.[422]

196. Nonetheless, instances exist, or can still be envisaged, where one State has the power to direct or control the activities of another State, whether by treaty, or as a result of a belligerent occupation, or for some other reason, and thus the issues raised by article 28 (1) do need to be addressed. Article 9 of the draft articles deals with the situation where the organ of one State is placed at the disposal of another, so that it acts under the sole direction or control of the receiving State.[423] Article 28 (1) is concerned with what is almost the converse situation, where the organs of a dependent State are subject to the direction or control of another State in breaching international obligations owed by the dependent State to a third State.

Is the criterion for implicated responsibility actual direction or the power to direct?

197. The first point is that article 28 (1) takes as the criterion for responsibility not only actual direction or control but also the power to direct or control. If the conduct occurred "in a field of activity in which [the dependent] State is subject to the power of direction or control of another State", then the responsibility of the other State is engaged. There is, however, little authority for such a wide rule in cases where the "dependent" State survives as a separate State in international law.[424]

- *The Robert E. Brown claim*. The Arbitral Tribunal in this case held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer War, "fell far short of what would be required to make her responsible for the wrong inflicted upon Brown". It went on to deny that Great Britain possessed power to interfere in matters of internal administration. But it also said that there was no evidence "that Great Britain ever did undertake to interfere in this way". Accordingly the relation of suzerainty "did not operate to render Great Britain liable for the act complained of".[425] The commentary infers that the existence of a mere power to interfere, even if not exercised, would have been enough to attract British responsibility, but the Tribunal did not actually say that. It was sufficient for its purposes to hold that there was neither a power to intervene nor any commitment by Great Britain to do so.
- *The Duc de Guise claim*. The Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a time when it was under Allied occupation. But it did not base its decision on the absence of Allied power to requisition the property, or to stop Italy from doing so (which power certainly existed at the time). Rather the majority pointed to the absence in fact of any "intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees".[426] In other words, the focus was on the exercise of power rather than its mere existence.
- *Drodz & Janousek v. France and Spain*. This decision of the European Court of Human Rights was discussed in the context of article 9.[427] The majority of the Court

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[422] Commentary to article 28, para. (4).

[423] See First Report, A/CN.4/Add.5, paras. 222–234.

[424] If the separate legal personality of the dependent State is not maintained, the case falls outside the scope of Chapter IV altogether.

[425] UNRIAA, vol. 6, p. 120 (1923), at pp. 130–131.

[426] See (1951) 18 ILR p. 426, discussed in the commentary to article 28, para. (22).

[427] ECHR Ser. A vol. 240 (1992), discussed in First Report, A/CN.4/490/Add.5, paras. 228–229.

held that France was not responsible for decisions of the courts of Andorra, unless by its own participation in them, or by its subsequent endorsement and implementation of a flagrant denial of justice, it assumed its own responsibility for them.[428] Unlike the minority, the Court was not prepared to infer French responsibility from the existence of any reserve powers France then may have possessed (itself or through the French co-prince), in the absence of any evidence of actual interference on its part.

198. These and other cases[429] do not support the broad proposition that whenever one State has the power to prevent another from committing an internationally wrongful act, it is responsible for failing to do so. Moreover, that proposition is undesirable in principle, since it would place a premium on intervention in the affairs of "dependent" States which are, *ex hypothesi*, still responsible for their own wrongful acts.[430] Of course, the dominant State will have obligations of its own in relation to a dependent State or to territory under its control or occupation. But the mere fact of its having power over the dependent State in some field is not a sufficient basis for imputing to it all the wrongful acts of the dependent State in that field.[431] Article 28 (1) should be limited to cases where a dominant State actually directs or controls conduct which is a breach of an international obligation of the dependent State.

Must the obligation breached be opposable to the dominant State?

199. Since the dominant State must direct or control the commission of the wrongful act, there is no need to specify further a nexus between its conduct and that of the State committing the wrongful act (as was necessary for article 27).[432] Two questions do remain, however. What information must the dominant State have of the circumstances amounting to the wrongful act which it directs or controls? Must the dominant State itself be bound by the obligation which is transgressed? The former question really only arises if a negative answer is given to the second. If the directing State is only to be responsible for conduct which would have been wrongful for itself, it will be on notice that the conduct it is directing another State to perform is or may be wrongful. On the other hand, if that State is to be considered as indirectly "bound" by the international obligations of the dependent State, the position may be different.

200. On this issue the position seems less clear than it was for article 27, since aid or assistance covers such a wide spectrum of cases and involves conduct which is very often neutral in character, whereas the concept of direction or control of wrongful conduct is already a more specific one. On balance, and for ease of application, the Special Rapporteur suggests that the same proviso be applied to article 28 (1) as to article 27. Thus the directing State should only be responsible for acts which would have been wrongful if it had carried out those acts itself. It should be stressed that this condition is of limited significance. All the cases referred to in the commentary or in the discussion of article 28 (1) involved

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[428] Ibid., at para. 110 ("the Convention does not require the Contracting Parties to impose its standards on third States or territories"). See also *Iribarne Pérez v. France*, ECHR Ser. A, vol. 325C (1995).

[429] See, e.g., *Lighthouses Arbitration (Claims No. 11 and 4)* (1956), 23 ILR 81, esp. at p. 90.

[430] For the position where the directing State is exclusively responsible for the conduct of the external affairs of the dependent State, see *British Claims in the Spanish Zone of Morocco*, UNRIAA, vol. 2, p. 615, at pp. 648–649 (1924).

[431] It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal apparatus of State does not mean that control was not exercised in fact by an occupying Power. Cf. *Restitution of Household Effects belonging to Jews Deported from Hungary*, (1965) 44 ILR 301 at pp. 340–342.

[432] See para. 180 above.

conduct (e.g., breaches of human rights or of obligations to aliens) which would have satisfied this condition.

Article 28 (2): Responsibility arising from coercing another State to commit an internationally wrongful act

201. Article 28 (2) deals with cases of coercion of one State by another. For the coercing State to be internationally responsible, article 28 (2) requires that the wrongful act should have been committed "as the result of coercion exerted ... to secure the commission of that act". In other words, the act must actually have been committed, it must have been committed as a result of the coercion and this must have been intended by the coercing State. In such cases, the coercing State is implicated in the internationally wrongful act of the State which has been coerced.

202. There is a verbal difficulty with this formulation.[433] If the acting State has truly been coerced, it will have been subjected to "an irresistible force" and the wrongfulness of its conduct will be precluded by *force majeure* under article 31. It is odd to speak of the wrongfulness of a coerced act, when the coercion amounts to *force majeure*, which is a circumstance precluding wrongfulness. As noted in discussing article 16, there is a problem with the relationship of Chapter V to Chapter III, and the existing language of article 28 reflects that problem.[434] The proposal for article 28 set out below resolves the problem by referring to "an act which, but for the coercion, would be an internationally wrongful act".

203. Turning to the substance of paragraph (2), the commentary suggests that, despite the nature of coercion as a form of imposition of will on the part of the coercing State, nonetheless the act of the coerced State remains its own act. Even if the coercion is itself unlawful,

> "the act [of the coercing State] will not for all that be identical with the act committed by the coerced State against a third State. The responsibility of the coercing State for the internationally wrongful act committed by the State coerced can therefore only be described as responsibility for the internationally wrongful act of another State."[435]

In conformity with this view, the commentary makes it clear that coercion for the purposes of article 28 is not limited to unlawful coercion:

> "for the purposes of the present article, 'coercion' is not necessarily limited to the threat or use of armed force, and should cover any action seriously limiting the freedom of decision of the State which suffers it — any measure making it extremely difficult for that State to act differently from what is required by the coercing State."[436]

Although the commentary is clear on this point, the question whether coercion ought to be limited to unlawful conduct has been raised by a number of Governments.[437]

Should coercion for the purposes of article 28 (2) be limited to unlawful coercion?

204. The choice between the alternatives is affected by questions relating to the scope of article 28, and in particular the meaning of coercion. In the Special Rapporteur's view, coercion for this purpose is nothing less than conduct which forces the will of the coerced

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[433] As noted by Switzerland: A/CN.4/488, p. 78; see para. 188 above.

[434] See paras. 11 and 14 above.

[435] Commentary to article 28, para. (28).

[436] Ibid., para. (29).

[437] See the comments of France and Mongolia, para. 188 above.

State, giving it no effective choice but to comply with the wishes of the coercing State. It is not enough that compliance with the obligation is made more difficult or onerous. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the coerced act make it more difficult for the coerced State to comply with some other obligation.

205. But if that is the correct understanding of article 28 (2), then it does not seem necessary to limit article 28 (2) to unlawful coercion. Most cases of coercion meeting the suggested definition will be unlawful, e.g., because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention (i.e., coercive interference) in the affairs of another State. But even if coercion may be lawful in certain cases,[438] article 28 (2) is concerned with the specific notion of coercion deliberately exercised to procure the breach of one State's obligation to another State. It is difficult to imagine any circumstances in which such coercion could be justified.

206. No doubt there are cases where a State is lawfully coerced. For example, a State may be compelled to withdraw from territory it has invaded by successful measures taken against it in self-defence. But the Charter does not envisage that measures will be taken in self-defence in order to coerce a State to breach a valid obligation to another State, so the hypothesis of self-defence can be excluded. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in Part Two of the draft articles, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.[439]

207. This analysis suggests that, having regard to the strictness of the conception of coercion underlying article 28 (2), it is unnecessary to limit that provision to coercion which is contrary to article 2, paragraph 4, of the Charter of the United Nations. By the same token, there is no reason why article 28 (2) should be limited to breaches of obligations by which the coercing State is also bound. If a State deliberately sets out to procure by coercion a breach of State B's obligations to State C, it should be held responsible to State C for the consequences. Moreover, in such a case, the wrongfulness of State B's conduct vis-à-vis State C will likely be precluded by distress or *force majeure*, so that State C's only remedy will be against State A. For these reasons, article 28 (2) should be retained, with appropriate drafting amendments to reflect the points made in the commentary.[440]

Article 28 (3): Preserving the responsibility of the acting State

208. Finally, paragraph 3 preserves the responsibility of the State which has committed the internationally wrongful act, albeit under the direction or control or subject to the coercion of another State. As noted by France, the same savings clause would be appropriate for article 27.[441] In addition, it should be made clear that the provisions of Part IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State.

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[438] On the debate about the definition and lawfulness of coercion, see P. Reuter, *Introduction au droit des traités* (PUF, Paris, 3rd edn., ed. Cahier, 1995), paras. 271–274.

[439] See also the remarks of the International Court on the proper purposes of countermeasures in the *Case concerning the Gabcikovo Nagymaros Project, I.C.J. Reports 1997*, p. 7, at pp. 55–57 (paras. 83–87).

[440] See para. 203 above.

[441] A/CN.4/488, p. 78.

3. Conclusions as to Chapter IV

209. On balance there seems to be support for the retention of Chapter IV as such, and for the main elements in articles 27 and 28, but with the clarifications and limitations that have been explained above. To summarize, all three bases of implicated or derived responsibility need to be articulated further, largely incorporating explanations given in the commentary, but also, in the case of articles 27 and 28 (1), limiting responsibility to cases of obligations opposable to the assisting or directing State. Since articles 27 and 28 (1) have more in common with each other than they do with article 28 (2), they could conveniently be combined in a single article, leaving the distinct issue of coercion to be dealt with in article 28.

210. The remaining issue is whether other elements of ancillary or inchoate responsibility ought to be included in Chapter IV. In some national legal systems, complicity and "indirect responsibility" are associated in a chapter of the law with other forms of accessory responsibility such as incitement, conspiracy and attempt. This is a field where national legal traditions diverge substantially. But one common feature appears to be that ancillary responsibility is more a feature of criminal law than it is of civil law.[442] So far as international law is concerned, if there is to be a developed distinction between international crimes and international delicts, one might expect that ancillary responsibility would likewise be more extensive for crimes. But in common with the rest of Part One (other than article 19 (2)–(4) itself), Chapter IV makes no such distinction.

211. Cases of inchoate responsibility do not involve the implication by one State in the wrongful conduct of another, and do not therefore fall within the scope of Chapter IV. In any event, there does not seem to be any general international law rule dealing with attempts to commit wrongful conduct.[443] Other possibilities should, however, be briefly referred to.

- *Incitement*. Conduct by a State in inciting another to commit an internationally wrongful act was deliberately excluded from Chapter IV. Only if it materially assists or actually directs or coerces another State to commit a wrongful act is a State implicated in that act.[444] This position seems to have been approved in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, where the Court noted that it was not concerned with "the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement".[445]
- *Conspiracy*. Where two States conspire to commit an internationally wrongful act, it is usually in the context of the subsequent joint commission of that act. At least, one of the conspiring States may well aid or assist the other, and depending on the facts, the planning might itself constitute such assistance. However, there does not seem to be any need for a general concept of "conspiracy" in international law, and certainly there is no need for such a notion in Chapter IV.

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[442] The same is true of inchoate responsibility. Thus an attempt to commit a crime may be unlawful, whereas an attempt to commit a delict or to breach a contract is usually not. For the question when an internationally wrongful act is actually committed, as distinct from planned or prepared, see paras. 102–106 above.

[443] See paras. 104 and 106 above.

[444] See commentary to article 27, paras. (6)–(7). See also Quigley, loc. cit. (note 297 above) at pp. 80–81.

[445] *I.C.J. Reports 1986*, p. 14, at p. 129 (para. 255). See also, and more categorically, Judge Schwebel, dissenting, ibid., at p. 379 (para. 259) ("Customary international law does not know the delict of 'encouragement'").

- *Assistance given after the commission of the wrongful act*. In certain circumstances, assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that wrongful act by the former State. In such cases it may assume responsibility for that act pursuant to article 15 *bis* as provisionally adopted in 1998.[446] Again, however, there seems to be neither call nor need for a separately identified notion of "complicity after the fact" in Chapter IV. Specific problems (e.g., in the field of money-laundering) can be dealt with by appropriately tailored primary rules.
- *Other cases of joint or collective action by States*. Reverting to the catalogue of cases of possible joint or collective action by several States, set out in paragraph 159 above, the analysis contained in the commentaries to Chapter IV and in the present report does not identify any further situation which needs to be dealt with in this Chapter. Issues may arise, however, in terms of reparation for conduct caused jointly by two or more States. Such issues will be addressed in the context of Part Two of the draft articles.

212. For the reasons given, the Special Rapporteur proposes the following articles in Chapter IV:

Chapter IV

Responsibility of a State for the acts of another State

Note. The earlier title for this chapter was "Implication of a State in the internationally wrongful act of another State". The new title proposed is both shorter and more accurate, since what the various cases in Chapter IV have in common is that State A is responsible for conduct which is actually performed by State B. Moreover, in the case where State B's conduct is coerced by State A, the wrongfulness of that conduct may be precluded so far as State B is concerned.

Article 27

Assistance or direction to another State to commit an internationally wrongful act

A State which aids or assists, or directs and controls, another State in the commission of an internationally wrongful act is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Notes. 1. Article 27 as adopted on first reading covered all aid or assistance "rendered for the commission of an internationally wrongful act carried out by" the assisted State. Such aid or assistance was internationally wrongful even if, taken alone, it would not have amounted to a breach of an international obligation. As now formulated, article 27 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the

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[446] See First Report, A/CN.4/490/Add. 5, paras. 281–286.

conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself. The first two limitations correspond to the intention of article 27 as adopted on first reading; the third is new. See paras. 177–186 above.

2. A State is not responsible for aid or assistance under article 27 unless the internationally wrongful act is actually committed by the assisted State. Article 27 does not address questions of the admissibility of judicial proceedings to establish the responsibility of the assisting State in the absence of or without the consent of the assisted State. See para. 174 above.

3. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act. On the other hand, mere incitement or encouragement, unaccompanied by aid or assistance, is not enough to give rise to responsibility under this article. See paras. 180 and 211 above.

4. The words "if it is established that", which appeared in article 27 as adopted on first reading, are unnecessary. It is clear from article 27 that each of the specified elements must be sufficiently established for ancillary responsibility to arise, quite apart from the general rule that State responsibility has to be established and is not to be presumed. See First Report, A/CN.4/490, paras. 36–38.

5. In addition, article 27 now covers the situation which was previously dealt with under article 28 (1), viz., where one State directs and controls another to breach its international obligation to a third State. The same qualifications apply to the conduct of a State in directing and controlling wrongful conduct as apply to aid or assistance, that is to say, the directing State must be aware of the circumstances making the conduct of the assisted State internationally wrongful, and the completed act must be such that it would have been wrongful had it been committed by the directing State itself. See paras. 195–200 above.

6. Although article 27 (1) used the term "direction or control" disjunctively, in the context of a narrower formulation of the principle, it seems desirable to limit the responsibility of a third State to cases where it "directs and controls" the conduct in question. By contrast with article 28 (1) as adopted on first reading, the direction or control must actually be exercised for responsibility to arise.

Article 28

Responsibility of a State for coercion of another State

A State which, with knowledge of the circumstances, coerces another State to commit an act which, but for the coercion, would be an internationally wrongful act of the latter State is internationally responsible for the act.

Notes. 1. Article 28 (2) as adopted on first reading dealt with coercion exercised by one State with a view to procuring conduct by another State which (if that State had not been coerced) would be a breach of that State's international obligations. It was not necessary that the coercion should have been independently unlawful, although in most cases it would be. This provision has been retained in a separate article. The commentary to former article 28 (2) made it clear that the coercing State had to be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct, *and although this requirement might be thought to be implicit in the notion of coercion to commit a wrongful act, it is now spelled out in the article.*

2. In the circumstances where coercion is used for this purpose, there is no reason to require that the act in question would have been unlawful if committed by the coercing State itself. There can be no justification for coercing another State to violate an international obligation, especially since, in circumstances where coercion has been used, the acting State may well be able to rely on the coercion as a circumstance precluding wrongfulness, thereby depriving the injured State of a remedy. See paras. 204–208 above.

Article 28 *bis*

Effect of this chapter

This chapter is without prejudice to:

(a) The international responsibility, under the other provisions of the present articles, of the State which committed the act in question;

(b) Any other ground for establishing the responsibility of any State which is implicated in that act.

Notes. 1. Article 28 (3) as adopted on first reading provided that that article was without prejudice to the responsibility of the State which had actually committed the wrongful act. This is equally true of article 27, and the savings clause has accordingly been applied to Chapter IV as a whole.

2. Chapter IV is also without prejudice to the application of any other rule of international law defining particular conduct as wrongful, and this is made clear in paragraph (b). See para. 208 above.